Docket for 05-416

(14)

No. 05-416
Title: Jeanne S. Woodford, et al., Petitioners
v.
Viet Mike Ngo
Docketed: October 3, 2005
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (03-16042)
Decision Date: March 24, 2005
Rehearing Denied: July 1, 2005
Question Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 29 2005	Petition for a writ of certiorari filed. (Response due November 2, 2005)
Oct 13 2005	Brief of respondent Viet Mike Ngo in opposition filed.
Oct 26 2005	DISTRIBUTED for Conference of November 10, 2005.
Oct 31 2005	Brief amici curiae of New York, et al. filed. (Distributed)
Nov 14 2005	Petition GRANTED.
Dec 29 2005	Brief amicus curiae of United States filed.
Dec 29 2005	Joint appendix filed.
Dec 29 2005	Brief of petitioners Jeanne S. Woodford, et al. filed.
Dec 29 2005	Brief amici curiae of New York, et al. filed.
Jan 23 2006	SET FOR ARGUMENT on Wednesday, March 22,2006.
Feb 1 2006	Brief amici curiae of Law Professors filed. (Distributed)
Feb 2 2006	Brief of respondent Viet Mike Ngo filed.
Feb 2 2006	Brief amici curiae of American Civil Liberties Union, et al. filed.
Feb 2 2006	Brief amicus curiae of Jerome N. Frank Legal Services Organization of Yale Law School filed.
Feb 2 2006	Brief amicus curiae of American Bar Association filed.
Feb 3 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 7 2006	CIRCULATED.
Feb 9 2006	Record received from U.S.C.A. - 9th Circuit. (1 envelope)
Feb 17 2006	Record received from U.S.D.C. - Northern District of California. (1 envelope) Some pleadings in this case have been electronically filed.
Feb 21 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 9 2006	Reply of petitioners Jeanne S. Woodford, et al. filed. (Distributed)
Mar 22 2006	Argued. For petitioners: Jennifer G. Perkell, Deputy Attorney General, San Francisco, Cal.; and Dan Himmelfarb, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for the United States, as amicus curiae.) For respondent: Meir Feder, New York, N.Y.

Supreme Court, U.S.
FILED
SEP 29 2005
OFFICE OF THE CLERK

No. 05-416

In The
Supreme Court of the United States

JEANNE S. WOODFORD
AND ANTHONY P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the
State of California
JAMES M. HUMES
Chief Assistant Attorney General
MANUEL M. MADEIROS
State Solicitor General
FRANCES T. GRUNDER
Senior Assistant Attorney General
THOMAS S. PATTERSON
Supervising Deputy Attorney General
JENNIFER G. PERKELL
Deputy Attorney General
Counsel of Record
State Bar No. 203205
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5726
Fax: (415) 703-5843

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under the Prison Litigation Reform Act, a prisoner cannot bring suit to challenge prison conditions under federal law "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This exhaustion requirement is not subject to "futility or other exceptions," *Booth v. Churner*, 532 U.S. 731, 746 n.6 (2001), and may not be waived by a district court, *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

This case presents the following question:

Does a prisoner satisfy the Prison Litigation Reform Act's administrative-exhaustion requirement by filing an untimely or otherwise procedurally defective administrative appeal?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
I. The Circuits Are Divided Over Whether an Untimely Administrative Appeal Satisfies the Prison Litigation Reform Act's Exhaustion Mandate	4
II. The Ninth Circuit's Decision Cannot Be Reconciled with This Court's Precedent Construing the Meaning of the Prison Litigation Reform Act's Exhaustion Mandate	6
III. The Issue Presented by the Circuit Conflict Is of Great Practical Importance for Federal Prison Litigation	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Hawk, 159 F.3d 1321 (11th Cir. 1998) 9

Booth v. Churner, 532 U.S. 731 (2001) 2, 6, 8

Johnson v. Meadows, 418 F.3d 1152 (11th Cir. 2005) 3, 4, 5, 6, 8

Ngo v. Woodford, 403 F.3d 620 (9th Cir. 2005) ..... *passim*

Porter v. Nussle, 534 U.S. 516 (2002) 2, 7, 8

Pozo v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002) 3, 5

Preiser v. Rodriguez, 411 U.S. 475 (1973) 7

Ross v. County of Bernalillo, 365 F.3d 1181 (10th Cir. 2004) 3, 4, 5

Spruill v. Gillis, 372 F.3d 218 (3d Cir. 2004) 3, 4

Thomas v. Woolum, 337 F.3d 720 (6th Cir. 2003) 3, 5, 6

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1997e(a) (West 2002) ..... *passim*

42 U.S.C. § 1997e(a) (1994 ed.) 2

OTHER AUTHORITIES

141 Cong. Rec. S14408-01, *S14413 (daily ed. Sept. 27, 1995) 9

28 C.F.R. § 542.14(a) 2

TABLE OF AUTHORITIES – Continued

Page

Annual Report, United States Courts for the Ninth Circuit 2003, http://www.ce9.uscourts.gov ("Publications") 10

Cal. Code Regs. tit. 15, § 3084.6(c) (2002) 2

John Scalia, U.S. Dep't of Justice, Prisoner Petitions Filed in U.S. District Courts 2000, with Trends 1980-2000 (Jan. 2002), http://www.ojp.usdoj.gov/bjs/pub/ascii/ppfusd00txt 10

PETITION FOR WRIT OF CERTIORARI

Jeanne S. Woodford, Undersecretary of the California Department of Corrections and Rehabilitation, and Anthony P. Kane, a Chief Deputy Warden for the Department, petition this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1-21) is reported at *Ngo v. Woodford*, 403 F.3d 620 (9th Cir. 2005) (Pregerson, Kozinski, Rhoades, Sr., JJ). The district court's order (App., *infra*, 22-26) is not reported.

JURISDICTION

The court of appeals issued its opinion on March 24, 2005, and denied a timely petition for rehearing on July 1, 2005 (App., *infra*, 27). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Under the Prison Litigation Reform Act, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (West 2002).

The California Code of Regulations provides that a prisoner must submit an administrative appeal "within 15 working days of the event or decision being appealed." Cal. Code Regs. tit. 15, § 3084.6(c) (2002).[1]

STATEMENT OF THE CASE

In 1996, Congress broadened the Prison Litigation Reform Act's administrative-exhaustion prescription by requiring that prisoners exhaust all "available" administrative remedies, regardless of whether they are "'plain, speedy, and effective.'" *Booth v. Churner*, 532 U.S. 731, 739 (2001) (quoting 42 U.S.C. § 1997e(a) (1994 ed.).) The new statute also eliminated a district court's discretion to dispense with administrative exhaustion. 42 U.S.C. § 1997e(a); *Booth*, 532 U.S. at 739. This Court has held that exhaustion is required even if the specific relief the prisoner seeks is not available through the state's administrative process, *Booth*, 532 U.S. at 741, and regardless of the type of prison-conditions claim the prisoner is alleging, *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

Although there is no dispute that exhaustion is mandatory under the Prison Litigation Reform Act, the courts of appeals are in sharp disagreement about what a prisoner must do in order to satisfy this mandate. The Third, Seventh, Tenth, and Eleventh Circuits have

[1] California's administrative filing deadline is substantially similar to that of the Federal Bureau of Prisons, which is "20 calendar days" from "the date on which the basis for the [Administrative Remedy] Request occurred." 28 C.F.R. § 542.14(a).

held that a prisoner must fully comply with the state's administrative-filing requirements in order to properly exhaust, or be barred from federal court. *Johnson v. Meadows*, 418 F.3d 1152, 1154 (11th Cir. 2005); *Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004); *Pozo v. McCaughtry*, 286 F.3d 1022, 1023 (7th Cir. 2002). By contrast, the Sixth and Ninth Circuits have held that a prisoner exhausts administrative remedies as long as he gives prison officials some opportunity to review his grievance, even if that grievance is filed outside the state's time limits or is otherwise procedurally deficient. App., *infra*, 21; *Thomas v. Woolum*, 337 F.3d 720, 723 (6th Cir. 2003).

Viet Ngo – a prisoner currently at Salinas Valley State Prison – was disciplined by prison officials on the basis that he engaged in "'inappropriate activity'" with volunteer Catholic priests. App., *infra*, 2. As a consequence of his prohibited conduct, Mr. Ngo was placed in administrative segregation and, upon his release from administrative segregation, was denied access to various prison programs, such as evening fellowship and religious study sessions. *Id.*

Many months later, Mr. Ngo filed his first administrative appeal to contest these events. App., *infra*, 2. But because state regulations require an inmate to file a grievance within fifteen working days of the decision or event being appealed, prison officials rejected the appeal as untimely. *Id.* at 2-3. Mr. Ngo filed a second administrative appeal in a further attempt to grieve the same events. *Id.* at 3. Prison officials again rejected the appeal as untimely. *Id.*

Mr. Ngo filed this civil-rights action, alleging that prison officials violated his First Amendment and due-process

rights by placing him in administrative segregation and by later denying him the opportunity to participate in prison programs. (CD 1.[2]) The district court dismissed the case because Mr. Ngo failed to exhaust his administrative remedies, as required by 42 U.S.C. § 1997e(a). App., *infra*, 26. Mr. Ngo timely appealed the district court's order.

The Ninth Circuit reversed the district court's dismissal, holding that the rejection of an administrative appeal for untimeliness constitutes exhaustion of "available" administrative remedies. App., *infra*, 21. The appellate court reasoned that because the prison rejected the two appeals, precluding Mr. Ngo from proceeding any further within the state's administrative system, no administrative remedies remained available to him within the meaning of § 1997e(a). (*Id.*)

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided Over Whether an Untimely Administrative Appeal Satisfies the Prison Litigation Reform Act's Exhaustion Mandate.

The Third, Seventh, Tenth, and Eleventh Circuits hold that an inmate's failure to timely exhaust administrative remedies within the state's system bars a § 1983 action, thereby reading a procedural-default mechanism into § 1997e(a). *Johnson v. Meadows*, 418 F.3d 1152, 1154 (11th Cir. 2005); *Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186

[2] "CD" stands for the district court's docket sheet in this action.

(10th Cir. 2004); *Pozo v. McCaughtry*, 286 F.3d 1022, 1023 (7th Cir. 2002). As the first appellate court to reach this conclusion, the Seventh Circuit held that "unless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred." *Pozo*, 286 F.3d at 1023. The court reasoned that "[a]ny other approach would allow a prisoner to 'exhaust' state remedies by spurning them," and therefore defeat Congress's objectives in requiring exhaustion. *Id.* at 1023-24. The Tenth Circuit concurred, holding that a prison procedure that is "procedurally barred and thus is unavailable to a prisoner is not thereby considered exhausted." *Ross*, 365 F.3d at 1186. In rejecting the Sixth Circuit's contrary holding in *Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003), the Tenth Circuit similarly concluded that permitting prisoners "to proceed to federal court simply because they have filed a time-barred grievance would frustrate the PLRA's intent." *Ross*, 365 F.3d at 1186. The Third Circuit, noting an "emerging split among the circuits," *Spruill*, 372 F.3d at 228, joined the Seventh and Tenth Circuits in holding that a procedural-default bar should be read into the Prison Litigation Reform Act's exhaustion requirement, concluding that Congress's policy objectives are better served by such a rule, *id.* at 230. The court observed that, without such a "backstop," an aggrieved prisoner "could evade § 1997e(a)'s exhaustion requirement by simply letting the time to present his grievance expire." *Id.* at 228. Most recently, the Eleventh Circuit agreed that § 1997e(a) contains a procedural-default component and, therefore, that a prisoner must either timely satisfy the state's administrative filing deadlines, or meet the state's "good cause" standard for failing to comply with such deadlines. *Johnson*, 418 F.3d at 1159. As did the Third, Seventh, and Tenth Circuits

before it, the Eleventh Circuit concluded that any other rule would undermine Congress's intent in the revised statute, *id.* at 1158, and "run counter to the understanding that § 1997e(a) requires prisoners to invoke and fully exhaust all available administrative grievance processes," *id.* at 1159.

In direct conflict, the Sixth and Ninth Circuits have declined to read a procedural-default mechanism into the Prison Litigation Reform Act. These circuits have held that a rule barring lawsuits by prisoners who fail to satisfy state-administrative-filing mandates improperly conflates the distinct concepts of administrative exhaustion and procedural default, and wrongly appropriates a doctrine from the federal-habeas context. App., *infra*, 13-17; *Thomas*, 337 F.3d at 725. Thus, the Sixth and Ninth Circuits have held that as long as the prisoner affords the state an "opportunity" to review his grievance, regardless of whether the grievance was filed timely or otherwise in compliance with the state's administrative procedures, the prisoner satisfies his exhaustion obligation. App., *infra*, 17; *Thomas*, 337 F.3d at 726. Under these decisions, a prisoner can render his administrative remedies "unavailable" within the meaning of § 1997e(a) by submitting an untimely administrative appeal that is properly rejected by prison officials. This Court's guidance is needed to resolve this conflict among the circuits.

II. The Ninth Circuit's Decision Cannot Be Reconciled with This Court's Precedent Construing the Meaning of the Prison Litigation Reform Act's Exhaustion Mandate.

In *Booth v. Churner*, 532 U.S. 731, 741 (2001), this Court held that when Congress passed the 1996 revisions

to § 1997e(a), it "mandated exhaustion clearly enough," *id.* at 741, and made a district court's discretion to waive the exhaustion requirement "a thing of the past," *id.* at 739. Accordingly, the Court found that the exhaustion prescription is no longer subject to "futility or other exceptions." *Id.* at 741 n.6. In holding that inmates are required to exhaust administrative remedies even if the specific relief they are seeking is not available through the state's administrative process, the Court observed that Congress's "imposition of an obviously broader exhaustion requirement makes it highly implausible that it meant to give prisoners a strong inducement to skip the administrative process" – in that case, by permitting prisoners to circumvent the requirement by limiting their prayers for relief to money damages. *Id.* at 740-41.

In *Porter v. Nussle*, 534 U.S. 516, 524 (2002), this Court reaffirmed its holding in *Booth* that a district court no longer has the discretion to dispense with exhaustion under the Prison Litigation Reform Act. Specifically, in holding that *all* claims about prison life must be exhausted, the Court ruled that a prisoner cannot evade the exhaustion requirement simply by alleging an excessive-force claim, or a claim concerning an isolated incident instead of generalized prison conditions. *Id.* at 532. In support of this conclusion, the Court reasoned that "[i]t seems unlikely that Congress, when it included in the PLRA a firm exhaustion requirement, meant to leave the need to exhaust to the pleader's option." *Id.* at 530 (citing *Preisser v. Rodriguez*, 411 U.S. 475, 489-90 (1973) ("It would wholly frustrate explicit congressional intent to hold that [prisoners] could evade this [exhaustion] requirement by the simple expedient of putting a different label on their pleadings.").)

The Court was significantly guided in this decision by what it found were Congress's objectives in invigorating the exhaustion statute: (1) to afford correctional officials the time and opportunity to take corrective action that might satisfy the inmate and obviate the need for litigation; (2) to filter out frivolous claims; and (3) to create an administrative record that delineates the contours of the controversy in the event that litigation ultimately ensues. *Id.* at 524-25. In so holding, the Court noted that the 1996 revisions to § 1997e(a) may have been indicative of Congress's belief that the Court had, in the past, been "shortsighted in failing adequately to recognize the utility of the administrative process to satisfy, reduce, or clarify prisoner grievances," *id.* at 525 n.4 (internal quotation marks omitted).

In contravention of the will of Congress as explicitly recognized by *Booth* and *Porter*, the Ninth Circuit has created a gaping exception to the Prison Litigation Reform Act's strict exhaustion mandate by permitting inmates to "exhaust" administrative remedies by disregarding them. App., *infra*, 21. The Ninth Circuit has thereby given prisoners the kind of "strong inducement to skip the administrative process" that this Court held Congress specifically sought to eradicate with the new exhaustion statute. *Booth*, 532 U.S. at 741. By holding that prisoners need not comply with the state's administrative procedures, the Ninth Circuit has likely ensured that, in many instances, inmate grievances will *not* be addressed and rectified internally before litigation, frivolous claims will *not* be filtered out, and there will be *no* administrative record available to the courts to assist in litigation. *See, e.g., Johnson v. Meadows*, 418 F.3d 1152, 1159 (11th Cir. 2005). Mr. Ngo's case is a perfect illustration of these points. Because Mr. Ngo did not file an appeal within the time

limits imposed by California regulations, prison officials did not review the merits of his complaint, his grievance did not trigger corrective action that might have obviated the need for litigation, and there was no development of an administrative record to assist the court in deciding the controversy.

III. The Issue Presented by the Circuit Conflict Is of Great Practical Importance for Federal Prison Litigation.

This Court has held that Congress's foremost concerns when it revised § 1997e(a) were to "reduce the quantity and improve the quality of prisoner suits." *Porter*, 534 U.S. at 524. As the Eleventh Circuit observed, "Congress did not enact the PLRA in a vacuum;" rather, it "held hearings and rendered findings, concluding that prisoners file more frivolous lawsuits than any other class of persons." *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998) (internal quotation marks omitted). The *Alexander* court noted that, at the time of the statute's passage, Congress found that the number of prisoner lawsuits had "'grown astronomically – from 6,600 in 1975 to more than 39,000 in 1994.'" *Id.* (quoting 141 Cong. Rec. S14408-01, *S14413 (daily ed. Sept. 27, 1995)).

The Ninth Circuit's rule that prisoners need not satisfy state-administrative-filing requirements before filing a lawsuit will likely increase the burden of unnecessary prisoner litigation on the federal courts. Mandating compliance with the state's administrative process can deter inmate litigation in at least three ways. First, a prisoner who receives satisfactory relief through the appeals process might lack the incentive to proceed to court. Second, a prisoner who receives an explanation from

prison officials why he is not entitled to any relief might conclude that his complaint is without merit and therefore be similarly disinclined to file a lawsuit. Third, a prisoner who knows at the outset that his grievance is entirely frivolous may hesitate to pursue it, understanding that it will first have to be scrutinized and addressed by multiple prison officials.

The Prison Litigation Reform Act "appears to have resulted in a decrease in the number of civil rights petitions filed by State and Federal prison inmates." John Scalia, U.S. Dep't of Justice, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000 (Jan. 2002), http://www.ojp.usdoj.gov/bjs/pub/ascii/ppfusd00txt. In 1995, 41,679 such petitions were filed, compared to 25,504 in 2000. *Id.* Even so, in 2003, in the district courts of the Ninth Circuit prisoner petitions constituted a full 26% of private civil cases, and 23% of civil cases in which the United States was a party. Annual Report, United States Courts for the Ninth Circuit 2003, at 22, http://www.ce9.uscourts.gov ("Publications"). The dramatic post-Prison Litigation Reform Act decrease in the huge number of prisoner suits could be substantially reversed if inmates are permitted to avoid the exhaustion requirement, thereby seriously impacting the federal courts' dockets.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: September 29, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
JAMES M. HUMES
Chief Assistant Attorney General
MANUEL M. MADEIROS
State Solicitor General
FRANCES T. GRUNDER
Senior Assistant Attorney General
THOMAS S. PATTERSON
Supervising Deputy Attorney General
JENNIFER G. PERKELL
Deputy Attorney General
Counsel of Record

Attorneys for Petitioners

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIET MIKE NGO, *Plaintiff-Appellant,* v. JEANNE S. WOODFORD, Warden; A.P. KANE, *Defendants-Appellees.*	No. 03-16042 D.C. No. CV-01-20674-JF OPINION

Appeal from the United States District Court
for the Northern District of California
Jeremy Fogel, District Judge, Presiding

Argued and Submitted
August 13, 2004 – San Francisco, California

Filed March 24, 2005

Before: Harry Pregerson and Alex Kozinski,
Circuit Judges, and John S. Rhoades, Sr.,* District Judge.

Opinion by Judge Pregerson

COUNSEL

Meir Feder, Jones Day, New York, New York, for the plaintiff and appellant.

Jennifer Perkell, Deputy Attorney General, San Francisco, California, for the defendants and appellees.

---

* Honorable John S. Rhoades, Sr., Senior United States District Judge for the Southern District of California, sitting by designation.

OPINION

PREGERSON, Circuit Judge.

We are asked to determine whether the district court properly dismissed a prisoner's complaint for failing to exhaust all available administrative remedies as required by the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 18, 28, and 42 U.S.C.), even though the prisoner's administrative appeal was deemed time-barred and no further level of appeal remained in the state prison's internal appeals process. This is an issue of first impression in our Circuit. We have jurisdiction under 28 U.S.C. § 1291, and reverse.

I. Background

Viet Mike Ngo is currently serving a life sentence at Avenal State Prison in California. Previously, Ngo was incarcerated at San Quentin State Prison. While at San Quentin, Ngo was placed in administrative segregation on October 26, 2000, as punishment for alleged "inappropriate activity" with volunteer Catholic priests. In December 2000, Ngo was placed back in the general prison population. As a condition of his release from administrative segregation, Ngo was restricted from participating in "special programs," such as evening fellowship and Bible study sessions. The prison also prohibited Ngo from corresponding with a former San Quentin Catholic Chapel volunteer.

On June 18, 2001, Ngo appealed the disciplinary action. The prison's Appeals Coordinator rejected Ngo's appeal as time-barred because Ngo had not filed his

appeal within fifteen working days of "the event or decision being appealed." *See* Cal. Code Regs. tit. 15, § 3084.6(c); *see also id.* §§ 3084.3(c)(6), 3084.5(a)(1). Six days after the rejection, Ngo filed a second grievance contending that his appeal was in fact timely. Ngo claimed that because he was appealing the continuing nature of his punishment, there were a series of continuing violations, and his appeal should not be time-barred. The Appeals Coordinator again rejected his appeal on the same untimeliness ground.

After the prison's Appeals Coordinator rejected Ngo's appeal, Ngo filed this action in district court under 42 U.S.C. § 1983. Ngo claimed that the restrictions on his participation in "special programs" violated his First Amendment rights to free speech and the free exercise of his religion. Ngo also asserted that the restrictions lessened the possibility that he would become eligible for parole. Finally, Ngo alleged that the prison officials defamed him by alleging that he had "engaged in sexual relationships with Catholic volunteer priests."

The district court granted the defendants' motion to dismiss Ngo's complaint. The court ruled that Ngo failed to exhaust all of his administrative remedies as required by the Prison Litigation Reform Act ("PLRA") before seeking relief in federal court. *See* 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under [§ 1983] . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."). In addition, the district court found that there were no extraordinary circumstances to excuse Ngo from exhausting his administrative remedies. Ngo now appeals the district court's order dismissing his complaint.

II. Discussion

A. Standard of Review

We review a district court's determination that a prisoner failed to exhaust administrative remedies *de novo*, and factual determinations for clear error. *Wyatt v. Terhune*, 315 F.3d 1108, 1117 (9th Cir.), *cert. denied sub nom. Alameida v. Wyatt*, 540 U.S. 810 (2003).

B. The PLRA

The National Association of Attorneys General solicited lists of outrageously frivolous lawsuits from its members to catalyze the enactment of the PLRA. *See* Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 Brook. L. Rev. 519, 520 (1996). Shortly after these lists of frivolous suits were distributed to media and Congress, the PLRA was attached as a rider to an omnibus appropriations bill and signed into law. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

The PLRA significantly altered how and when prisoners could file suits in federal courts to challenge the conditions of their confinement. Despite the PLRA's impact on more than a million prisoners, hardly any legislative history exists behind its enactment. *See* 142 Cong. Rec. S2285-02 at S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy) ("[T]he PLRA was . . . never the subject of a committee mark-up, and there is no Judiciary Committee report explaining the proposal. The PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves."); *id.* at S2297 (statement of Sen. Simon) ("I am very discouraged that this legislation was considered as

one of many issues on an appropriations bill. Legislation with such far reaching implications certainly deserves to be thoroughly examined by the committee of jurisdiction and not passed as a rider to an appropriations bill.").

Overall, the PLRA was intended to reduce judicial micro management of correctional facilities and to respond to what was perceived as a flood of frivolous lawsuits filed by prisoners.[1] *See* 141 Cong. Rec. S14611-01 at S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole) (stating that the amendment would put an end to "inmate litigation fun-and-games" and restrain micromanagement of state and local prison systems). To achieve these goals, the PLRA erected procedural hurdles designed to filter out frivolous prisoner claims. *See, e.g., id.* at S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system."). Even so, this was a dramatic departure from established Supreme Court precedent. *Compare Wilwording*

---

[1] This being said, the PLRA's sparse legislative history primarily consists of PLRA proponents parroting the frivolous cases compiled by the National Association of Attorneys General. *See, e.g.*, 141 Cong. Rec. S14611-01 at S14627-29 (daily ed. Sept. 29, 1995) (statement of Sen. Reid); 142 Cong. Rec. S10576-02 at S10576-77 (daily ed. Sept. 16, 1996) (statement of Sen. Abraham). Sadly, several of the most widely cited cases of frivolous prisoner lawsuits were mischaracterized by the proponents of the PLRA. *See* 62 Brook. L. Rev. 519, 520 (stating that the descriptions of the facts of prisoners' lawsuits contained on the list of frivolous suits circulated to Congress and media were "at best highly misleading and, sometimes, simply false"); *see also Changing the Rules: Prison Officials and Legislators Mount an All-Out War Against Prisoners' Right to Legal Access, at* http://www.prisonactivist.org/crisis/plra-update.html (last visited February 18, 2005).

v. Swenson, 404 U.S. 249, 251 (1971) (per curiam) (declaring that inmates "are not held to any stricter standard of exhaustion [of remedies]" than other civil rights litigants), *with id.* § 1997e(a).

The procedure at issue in the present case is the PLRA's exhaustion requirement. This requirement prohibits prisoners from bringing suits in district court before first exhausting all available administrative remedies. *See* 42 U.S.C. § 1997e(a).

During congressional hearings, the Department of Justice declared that the PLRA would make the exhaustion requirement applicable to prisoners consistent with other exhaustion requirements. The PLRA was to "strengthen[] the administrative exhaustion rule in this context – and bring[] it more into line with administrative exhaustion rules that apply in other contexts – by generally prohibiting prisoner § 1983 suits until administrative remedies are exhausted." *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866, S. 930, H.R. 667 Before the Senate Comm. on the Judiciary*, 104th Cong. 20-21 (1995) (statement of Associate Attorney General John R. Schmidt).

In short, administrative exhaustion rules have two principal purposes. *See McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (superseded by amendment of § 1997e(a)). The first is to protect an administrative agency's authority by giving the agency the first opportunity to resolve a controversy before a court intervenes in the dispute. *See id.* The second is to promote judicial efficiency by either resolving the dispute outside of the courts, or by producing a factual record that can aid the court in processing a plaintiff's claim. *Id.* at 145-46.

C. Ngo Exhausted All Available Administrative Remedies as Required by the PLRA

To appeal a state prison's administrative decision, a California inmate must go through a four-step process.

Step 1: With exceptions not relevant here, within fifteen working days of "the event or decision being appealed," the inmate must first file an "informal" appeal, whereby "the appellant and staff involved in the action or decision attempt to resolve the grievance informally." *See* Cal. Code Regs. tit. 15, §§ 3084.5(a), 3084.6(c).

Step 2: Following rejection of the informal appeal, an inmate may file a first formal appeal with the prison's Appeals Coordinator within fifteen working days. *See id.* §§ 3084.5(b), 3084.6(c). The Appeals Coordinator, charged with screening and categorizing appeals, "may" reject appeals if "[t]ime limits for submitting the appeal are exceeded and the appellant had the opportunity to file within the prescribed time constraints." *Id.* § 3084.3(c)(6). The regulations do not provide for review of an appeal at a higher administrative level if it has first been rejected on this procedural ground. *See id.* § 3084.3. But the prisoner may file a challenge with the Appeals Coordinator if he feels that the procedural ground was inaccurate. *See id.*

Steps 3 and 4: The second formal appeal is reviewed by the institution's head or regional parole administrator, while a designee of the Director of the Department of Corrections hears the third formal appeal. *See id.* § 3084.5(e)(1)-(2). The disposition of the third formal appeal is final and concludes all administrative remedies. *Id.* § 3084.1(a).

As required under California law, Ngo filed an appeal with the Appeals Coordinator on June 18, 2001.[2] The Appeals Coordinator exercised his discretion to screen out the appeal because Ngo did not file it within fifteen days of the December 2000 disciplinary action, as was required under the first step of California's prison administrative appeals process.[3] The Appeals Coordinator informed Ngo that the decision to screen out his untimely appeal could not be appealed unless Ngo alleged that his appeal was in fact timely. Consequently, Ngo challenged the Appeals Coordinator's reason for rejecting his appeal in a follow-up petition a week later, asserting that the ongoing nature of his injury preserved the timeliness of his appeal. The Appeals Coordinator again rejected Ngo's appeal.

The district court concluded that only a decision at the third formal level of appeal exhausts a prisoner's administrative remedies. Because no such ruling was rendered in the instant case, the district court held that Ngo had not exhausted his administrative remedies. According to the district court, the Appeals Coordinator's rejection of Ngo's appeal for untimeliness did not excuse Ngo from exhausting all levels of appeal, but this reasoning is not

---

[2] The record is unclear whether the June 18, 2001, appeal was at the informal or first formal level. The district court referred to the June appeal as informal. Ngo, however, claims that a letter he sent on March 20, 2001, to the Deputy Warden constituted his informal appeal, while the June 18, 2001, appeal comprised his first formal appeal. The Appeals Coordinator screens out appeals at the first formal level, not at the informal level. This suggests that the June 2001 appeal, rejected by the Appeals Coordinator for untimeliness, was in fact Ngo's first formal appeal.

[3] Why prison filing deadlines tend to be so short is unclear. *See McCarthy*, 503 U.S. at 152 ("[W]e have not been apprised of any urgency or exigency justifying this timetable.").

persuasive. The PLRA requires prisoners to exhaust all *available* administrative remedies before filing a § 1983 claim in federal court. *See* 42 U.S.C. § 1997e(a). With the Appeals Coordinator's second decision, Ngo exhausted his appeals because he could go no further in the prison's administrative system; no remedies remained available to him.

The defendants have the burden of raising and proving a prisoner's failure to exhaust under the PLRA. *See Wyatt,* 315 F.3d at 1119. Attempting to carry this burden, the defendants assert that Ngo's failure "to comply with applicable administrative filing requirements" was equivalent to a failure to exhaust. This argument, however, confuses the doctrines of exhaustion and procedural default.

As explained below, the failure to exhaust bars a remedy in federal court if one is still available in the state's administrative system. *See Franklin v. Johnson,* 290 F.3d 1223, 1230-31 (9th Cir. 2002). By contrast, procedural default has its origins in the adequate and independent state ground doctrine and blocks federal courts from considering a state court's judgment "if that judgment rests on a state-law ground that is both independent of the merits of the federal claim and has an adequate basis for the court's decision." *Id.* at 1230 (quoting *Harris v. Reed,* 489 U.S. 255, 260 (1989)). Thus, unlike the exhaustion doctrine, procedural default bars federal review in two situations: "when a state court has been presented with the federal claim, but declined to reach the issue for procedural reasons, or if it is clear that the state court would hold the claim procedurally barred." *Id.* at 1230-31 (citing *Harris,* 489 U.S. at 263 n.9) (internal quotations omitted).

D. Failure to Exhaust and the Procedural Default Doctrine

Twenty years ago, the Supreme Court noted the "difficult" questions that would be presented by imposing an exhaustion requirement on § 1983 suits, including what preclusive effect state administrative determinations would have on subsequent federal suits. *Patsy v. Bd. of Regents,* 457 U.S. 496, 513-14 (1982). In our case, defendants assert that Ngo failed to exhaust his available administrative remedies because the Appeals Coordinator held Ngo's claim to be procedurally barred for untimeliness. Procedural default, however, is not necessarily synonymous with a failure to exhaust. *Cf. Franklin,* 290 F.3d at 1230 (clarifying that the doctrines of exhaustion and procedural default "developed independently and on different grounds, apply in different situations, and lead to different consequences").

To demonstrate a failure to exhaust, defendants must specify which remedies remain available to Ngo following the Appeals Coordinator's decision. *Cf. id.* at 1230-31. The defendants offer no guidance on how Ngo can cure his supposed failure to exhaust or what remedies, if any, remain available to Ngo. Instead, the defendants' argument rests on procedural default and not exhaustion. We must therefore determine whether a failure to timely exhaust a prison's administrative remedies under the PLRA procedurally bars a subsequent suit in district court.

To answer this question, we must first decide if the PLRA's exhaustion requirement is analogous to either administrative or habeas exhaustion. This will help us determine whether an untimely prisoner grievance nonetheless satisfies the PLRA's exhaustion requirement or if

the untimely grievance will be barred under the procedural default doctrine.

We are not the first circuit to address this issue. Four other circuits have ruled on whether an untimely administrative appeal satisfies the PLRA's exhaustion requirement. The Sixth Circuit held that it does; the Third, Seventh, and Tenth held that it does not.

1. The Sixth Circuit: An Untimely Administrative Appeal Satisfies the PLRA's Exhaustion Requirement

In *Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003), the Sixth Circuit held that a prisoner exhausts all available administrative remedies when he finishes "one complete round of the prison [grievance] process," regardless whether he filed a timely appeal. *Id.* at 733. The court explained that the PLRA's exhaustion provision is "a benefit accorded to state prisons, an opportunity to satisfy those inmate grievances the state wishes to handle internally." *Id.* at 726 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)).

According to the Sixth Circuit, when filing a late claim, a prisoner fulfills the letter and spirit of the PLRA by providing the state an opportunity to review the claim. *See id.* If the state refuses to consider the claim, then this decision should not "handcuff the federal courts in adjudicating cases involving important federal rights." *Id.*

2. The Third, Seventh, and Tenth Circuits: An Untimely Administrative Appeal Does Not Satisfy the PLRA's Exhaustion Requirement

Confronted with similar situations, the Seventh and Tenth Circuits interpreted the PLRA's exhaustion requirement as requiring a timely grievance by a prisoner at the administrative level before the prisoner initiates a federal cause of action. *See Ross v. County of Bernalillo,* 365 F.3d 1181 (10th Cir. 2004); *Pozo v. McCaughtry,* 286 F.3d 1022 (7th Cir. 2002), *cert. denied,* 537 U.S. 949 (2002). Both circuits feared that prisoners would purposely avoid administrative dead lines, thereby undermining the PLRA's objective of offering prisons the first opportunity to resolve a prisoner's complaint. *See Ross,* 365 F.3d at 1186; *Pozo,* 286 F.3d at 1023-24.

Specifically, the Seventh Circuit concluded that without some doctrine akin to procedural default, prisoners could "'exhaust' state remedies by spurning them." *Id.* Thus, in the Seventh Circuit, "procedural default also means failure to exhaust one's remedies." *Id.* at 1024. *But see Franklin,* 290 F.3d at 1230 (distinguishing the two concepts). An inmate's failure to timely exhaust administrative remedies, regardless of the merits of his grievance, bars the inmate from bringing a subsequent federal suit. *See Pozo,* 286 F.3d at 1024 ("Failure to do what the state requires bars, and does not just postpone, suit under § 1983."). To hold otherwise, according to the Seventh Circuit, would leave the PLRA's exhaustion requirement "without any oomph." *Id.* at 1025.

The Third Circuit likewise concluded that the PLRA contains a procedural bar rule, emphasizing that its policy goals would be best served by requiring prisoners to file

timely grievances with prisons before launching a § 1983 action. *See Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004) ("We believe that Congress's policy objectives will be served by interpreting § 1997e(a)'s exhaustion requirement to include a procedural default component."). But the *Spruill* court had some qualms about its holding. It found "neither position entirely satisfactory," and acknowledged that "an exhaustion rule can (though need not) be fairly read to include a procedural default component." *Id.* at 229-30.

As explained below, the Third, Seventh, and Tenth Circuits' arguments do not convince us, primarily because we think their heavy reliance on the need for a procedural bar similar to that found in the habeas context is misplaced.

3. The PLRA's Exhaustion Requirement is Not Analogous to Habeas Exhaustion

"[A]s a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act." *Rose v. Lundy*, 455 U.S. 509, 515 (1982); *see also Powell v. Lambert*, 357 F.3d 871, 874 (9th Cir. 2004) ("[I]f a state procedural bar is an adequate and independent ground for dismissal, habeas corpus is foreclosed in federal court. . . ."). That is why a state prisoner must first exhaust the remedies available at the state level before petitioning for federal habeas corpus relief. *See Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991) (holding that the independent and adequate state ground doctrine bars federal habeas if the prisoner failed to meet a state procedural requirement).

Specifically, "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). Even though the habeas exhaustion requirement under § 2254 does not specifically mention procedural default, the Supreme Court has grafted procedural default onto § 2254's exhaustion requirement. As a result, a prisoner may be procedurally barred from bringing a habeas petition in federal court even though he has technically exhausted his claims with an untimely habeas petition filed in state court.

In habeas corpus cases, the merger of exhaustion with procedural default protects federal-state comity by providing state courts with the first opportunity to correct their errors. This upholds the dignity of state judgments by preventing inmates from "undermin[ing] the State's interest in enforcing its laws" through an "end run" by strategically defaulting in state court to avoid the habeas exhaustion requirement. *Coleman,* 501 U.S. at 730-31. Essentially, the state criminal process should be the "main event" rather than a "tryout on the road" to a dispositive federal habeas hearing. *Wainwright v. Sykes,* 433 U.S. 72, 90 (1977) (internal quotation marks omitted).

A state's sovereignty, however, is less threatened when a federal court reviews "a non-criminal state administrative process" for violations of constitutional rights compared to when a federal court reviews a collateral attack on a sovereign state court's judgment. *See Thomas,* 337 F.3d at 727 n.2. Section 1983 suits by prisoners do not collaterally attack a prison grievance proceeding and do not require a collateral review.

Even though the PLRA uses language similar to that of § 2254, nothing in the PLRA mentions procedural default or indicates an intent to bar suits by prisoners who fail to meet administrative time requirements mandated by prisons. In fact, the language of § 1997e(a) strongly suggests that an exhaustion requirement defers, not bars, a federal suit: inmates may not sue "*until* such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). This is in contrast to the language used for habeas exhaustion requirement: the writ may not issue "*unless* . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1) (emphasis added).

Moreover, the PLRA has no language instructing courts how to treat administrative findings. In this case, for instance, the Appeals Coordinator determined that Ngo's appeal was untimely, resolving a very difficult legal issue that depends on whether the restrictions should be treated as a continuing injury or a one-time harm at the time they were imposed. Unlike § 2254, which explicitly provides a standard of review for collateral re-examination of state court rulings on issues of fact and law, *see* 28 U.S.C. § 2254(d), nothing in the PLRA directs federal courts to defer to such a legal conclusion, or to any factual findings made by prison administrators. Prison grievance proceedings are not sufficiently judicial in nature to warrant preclusive effect at all. *Cf. Cleavinger v. Saxner*, 474 U.S. 193, 203-04 (1985) (holding that members of a prison disciplinary committee were not entitled to the absolute immunity accorded judges because they were not "professional hearing officers, as are administrative law judges," and that disciplinary hearings were not required to observe judicial norms). Prison grievance

administrators are not judges trained to handle the intricacies of the legal issues in cases they hear; they do not enforce constitutional rights and cannot award damages to inmates. Furthermore, the standards governing suits in state or federal courts are not necessarily adhered to during prison grievance proceedings. Simply put, a prison's administrative grievance proceeding can in no way be the "main event" in a prisoner's attempt to have a *constitutional* violation redressed.

The defendants urge that barring Ngo's § 1983 action will best serve the policy objectives of the PLRA's exhaustion requirement by "afford[ing] corrections officials time and opportunity to address complaints internally," and to take "corrective action . . . [that] might improve prison administration and satisfy the inmate." *Porter v. Nussle,* 534 U.S. 516, 524-25 (2002). Furthermore, the defendants worry that, by the time an inmate files an appeal, the inmate's injury may "no longer be amenable to intervention or rectification by the prison." Appellees' Supplemental Answering Brief at 7. In addition, the defendants express concern that a ruling in favor of Ngo would encourage prisoners to file a late claim in order to skip the administrative process and head straight to federal court.

But the defendants fail to recognize that internal administrative appeals offer prisoners the fastest route to a remedy. *See Thomas,* 337 F.3d at 732 ("[P]otential litigants will still have every incentive to raise their grievance within the prison's timelines, because it is in the prison grievance process that inmates will, for most practical purposes, receive their swiftest and most effective remedies."). We have no reason to believe that prisoners will not avail themselves of "the most efficient mechanism to remedy a violation of federal law." *Id.* at

726. Prisoners have every incentive to seek administrative review before suing in federal court. After all, the administrative process provides prisoners with an additional attempt to win a favorable ruling. *See Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 764 (1979) (finding "[n]o reason" why one would "forgo an available state remedy" where, as here, "[p]rior resort to the state remedy would not impair the availability of the federal remedy"). These are all strong reasons why prisoners will not bypass the administrative process by purposely not filing a timely grievance. Here, for example, we are not dealing with a case where the prisoner deliberately bypassed the administrative process, or even a case of protracted delay. Ngo gave the prison grievance process a chance to work; indeed, it's debatable whether his appeal was even untimely.

Even assuming that an inmate wished to skip a prison's grievance system in order to quickly get into district court, the inmate must still submit his untimely grievance to the prison and appeal all denials of his claims completely through the prison's administrative process to satisfy the PLRA's exhaustion requirement. Holding that the PLRA does not contain a procedural default bar thus would in no way obstruct the goal of allowing prison officials first crack at resolving prisoners' grievances. It is for the prison to decide whether to exercise its discretion and accept or refuse the opportunity to hear the case on the merits regardless whether the grievance is timely filed. In this case, the Appeals Coordinator *could* have considered Ngo's appeal; she was authorized to do so by the grievance regulations, but elected not to.

4. The PLRA's Exhaustion Requirement Is More Like Administrative Exhaustion

The exhaustion doctrine has also been used in administrative law. Exhaustion in the administrative context protects an administrative agency's authority. *See McCarthy*, 503 U.S. at 145. In addition, administrative exhaustion "promotes judicial efficiency" by allowing the agency the opportunity to correct its own errors and to create a record which might facilitate judicial review. *Id.*

In cases involving other federal statutes, the Supreme Court has stated that administrative exhaustion does not include a procedural default component. For example, in *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988), the Supreme Court held that a Title VII complainant's untimely grievance was irrelevant in determining whether she could proceed to federal court. *See id.* at 123. Similarly, in *Oscar Mayer & Co.*, the Court held that state procedural defaults in claims under the Age Discrimination in Employment Act "cannot foreclose federal relief." 441 U.S. at 762; *see also id.* at 759 ("[T]here is no [statutory] requirement that, in order to commence state proceedings and thereby preserve federal rights, the grievant must file with the State within whatever time limits are specified by state law.").

Thus, a procedural default has not been implanted into either the Age Discrimination in Employment Act's or Title VII's exhaustion requirements. Both cases give us pause about imposing a sanction that bars claims which failed to comply with administrative timing deadlines, in the absence of any statutory direction to do so. *Cf. Franklin*, 290 F.3d at 1231 (explaining that the "long-established differences between the exhaustion requirement and the

procedural default doctrine preclude any conclusion that Congress implicitly intended to reach" one by a statutory reference to the other); *Patsy,* 457 U.S. at 514 (reasoning that the "difficult questions concerning the design and scope of an exhaustion requirement . . . might be answered swiftly and surely by legislation").

Moreover, such a scheme would penalize the less sophisticated and less informed who are unable to satisfy complex and demanding procedural requirements, regardless of the merits of their claims. *Cf. McCarthy,* 503 U.S. at 153 ("As a practical matter, the filing deadlines . . . may pose little difficulty for the knowledgeable inmate accustomed to grievances and court actions. But they are a likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim.").

Congress intended § 1997e(a) "to reduce the quantity and improve the quality of prisoner suits." *Porter,* 534 U.S. at 524. Merging procedural default with the PLRA's exhaustion requirement, though, would potentially reduce the quantity of meritorious suits and would not necessarily improve the quality of the surviving suits. In addition, neither the interests of federalism nor comity are served by imposing a procedural default component on the PLRA's exhaustion requirement. We recognize that procedural bars will certainly filter out some suits brought by prisoners. But neither can we be blind to "the serious impact on prisoners with legitimate claims who are unrepresented, unschooled in litigation, and often ill-equipped to negotiate an administrative system far harsher in its

procedural requirements than state or federal courts."[*] Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 Emory L.J. 1771, 1813 (2003).

In sum, the PLRA exhaustion requirement tends to resemble administrative exhaustion. Thus, the reasons for utilizing procedural default doctrine in the habeas context are generally irrelevant to prisoner suits under the PLRA. There is no need for us to convert a rule governing the timing of lawsuits into one that bars them entirely.

III. CONCLUSION

In a prison grievance system, the trust between prisoners and the administration is minimal at best, and nonexistent at worst. As is, prison grievance procedures are sufficiently difficult for prisoners to comply with. Judicial imposition of the procedural default doctrine on suits brought under the PLRA, coupled with the relatively short filing periods for prisoner grievances, might very well preclude prisoner-litigants with meritorious claims from ever bringing suit. Not even proponents of the PLRA wanted to bar worthy claims.

Procedural default is not an inextricable element of the PLRA's exhaustion requirement. If it were, prisoners'

---

[*] For instance, the current limitations period for § 1983 actions in California is two years. *See Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004). If the plaintiff is a California inmate the statute of limitations would effectively shrink to fifteen working days under the procedural bar rule adopted in cases like *Pozo*. *See* Cal. Code Regs. tit. 15, §§ 3084.3(c)(6), 3084.5(a)(1), 3084.6(c). The purpose of the PLRA was to reduce the number of meritless lawsuits, not simply to make things harder for inmates, irrespective of the merits of their claims.

access to courts would be based on their ability to navigate procedural minefields, not on whether their claims had any merit. Moreover, prison administrators should not be given an incentive to fashion grievance procedures which prevent or even defeat prisoners' meritorious claims.

Thus, we hold that Ngo exhausted all administrative remedies available to him as required by the PLRA when he completed all avenues of administrative review available to him: His administrative appeal was deemed time-barred and no further level of appeal remained in the state prison's internal appeals process. We also hold that the PLRA's exhaustion requirement does not bar subsequent judicial consideration of an exhausted administrative appeal that was denied on state procedural grounds.[5] Accordingly, the district court's dismissal of Ngo's complaint is **REVERSED**.

---

[5] We therefore do not decide whether the Appeals Coordinator properly determined that Ngo's appeal was untimely, or what standard of review would apply were we to do so.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIET M. NGO, Plaintiff, v. J.S. WOODFORD, et al., Defendants.	No. C 01-20674 JF (PR) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (Filed May 5, 2003) (Doc # 12)

Plaintiff, appearing pro se, filed the instant complaint pursuant to 42 U.S.C. § 1983 in July 2001. Plaintiff alleges that while he was an inmate at San Quentin State Prison, Defendants J.S. Woodford, A.P. Kane, J. Rubia, H. Hammond, B.J. Carlile, and I.A. Nienhuis, (hereinafter "Defendants"), violated his constitutional rights to free exercise of religion, free speech, and due process of law. Plaintiff also claims Defendants are liable for defamation under state law. Defendants, prison officials at San Quentin, filed the present motion to dismiss in January 2003. They contend that Plaintiff failed to exhaust his administrative remedies before bringing this action. They also argue that Plaintiff's claims are moot because Plaintiff currently is an inmate at Avenal State Prison and no longer is incarcerated at San Quentin. Finally, Defendant Woodford argues that Plaintiff has not established supervisory liability under § 1983 because he fails to show how Woodford personally was involved in or knew of the alleged violations. Plaintiff filed an opposition to Defendants' motion in February 2003. Plaintiff seeks injunctive relief, compensatory and punitive damages, removal of reports alleging misconduct with volunteers, a restraining order against retaliation, and appointment of counsel in

his complaint. Because it concludes that Plaintiff did not exhaust all available administrative remedies before filing suit, the Court will dismiss the present action without prejudice.

BACKGROUND

On June 18, 2001, while incarcerated at San Quentin State Prison, Plaintiff filed an administrative grievance at the informal level of review. The grievance alleged that Defendants (1) violated his right to religious freedom by interfering with his ability to practice his religious faith; (2) violated his First Amendment right by forbidding him from having contact with a prison volunteer; and (3) defamed him and violated his right to privacy by relating to other inmates unproven allegations that Plaintiff engaged in inappropriate relations with volunteer priests. On June 25, 2001, Plaintiff filed a second grievance at the informal level. This grievance alleged that Defendants violated his right to due process by refusing to allow him to participate in the prison's special programs. The prison appeals coordinator rejected both grievances because of the extensive lapse of time between the occurrence of the alleged violations and the dates on which Plaintiff filed his grievances.

On July 18, 2001, Plaintiff filed his paid complaint in this Court, alleging the same violations contained in the two administrative grievances described above. Plaintiff alleges that he exhausted all available administrative grievance procedures. Specifically, he states that he submitted two appeals but that the "San Quentin Appeals Office refused to process [them] claiming time constraints for filing not being met." Complaint at 2.

DISCUSSION

The Prison Litigation Reform Act provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); *see also Booth v. Churner,* 121 S. Ct. 1819, 1825 (2001) ("Congress has mandated exhaustion . . . regardless of the relief offered through administrative procedures"). California provides its prisoners and parolees the right to appeal administratively "any departmental decision, action, condition or policy perceived by those individuals as adversely affecting their welfare." Cal. Code Regs. tit. 15, § 3084.1(a). They may even file appeals alleging misconduct by correctional officers. *See id.* § 3084.1(e).

In order to exhaust available administrative remedies within this system, a prisoner must proceed through several levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third level appeal to the Director of the California Department of Corrections. *Barry v. Ratelle,* 985 F. Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A final decision from the Director's level of review satisfies the exhaustion requirement under § 1997e(a). *Id.* at 1237-38.

Here, Plaintiff submitted two grievances to the informal level of review. Both grievances were rejected by the prison appeals coordinator. The grievance filed June 18, 2001 was rejected on grounds that the "issues transpired last year," and the grievance filed June 25, 2001 was

rejected on the basis that "it started back in 2000 and [Plaintiff] waited 6 months before addressing this issue." Plaintiff's Dec. in Support of Opposition, Exh. A, (Inmate Appeals Screening Forms; June19, 2001 and June 26, 2001).

Plaintiff alleges he has fully exhausted his administrative remedies. He argues that he "submitted administrative appeals on each of the issues" but that the "San Quentin Appeals Coordinator refused to process the appeals and screened the[m] out." Plaintiff's Opposition at 3. Plaintiff asserts that it is therefore "impossible to submit an appeal to the next level when the appeal is rejected for processing at the first instance." *Id.*

Plaintiff's argument lacks merit. As Defendants correctly point out, "that the appeals office allegedly refused to process his original appeals does not excuse plaintiff from the exhaustion mandate, as three more levels of review remain available to him." Defendants' Motion to Dismiss at 4. Plaintiff has not alleged any extraordinary circumstances that would excuse him from at least attempting to pursue his administrative appeals.

District courts lack discretion under § 1997e(a) to excuse exhaustion. *Booth,* 121 S. Ct. at 1825 n.5. Nor may they read "futility or other exceptions" into § 1997e(a). *Id.* at 1825 n.6. Plaintiff must, at a minimum, show he has attempted to exhaust California's prison administrative process through each level of review for each of his claims. Until he has done so, he may not seek relief from the courts.

CONCLUSION

Because it concludes that Plaintiff failed to exhaust all available administrative remedies, the Court declines to address the additional grounds presented in Defendants' motion to dismiss. The motion to dismiss (doc # 12) is GRANTED. Plaintiff's complaint is DISMISSED without prejudice.

The Clerk shall close the file.

IT IS SO ORDERED.

DATED: 5-5-03

/s/ Jeremy Fogel
JEREMY FOGEL
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIET MIKE NGO, Plaintiff-Appellant, v. J.S. WOODFORD, ET AL., Defendants-Appellees.	No. 03-16042 D.C. No. CV-01-20674-JF ORDER (Filed Jul. 1, 2005)

Before: PREGERSON and KOZINSKI, Circuit Judges, and RHOADES[1] District Judge

The panel, as constituted above, have voted to deny defendants-appellees' petition for rehearing. Judges Pregerson and Kozinski have voted to reject the suggestion for rehearing en banc and Judge Rhoades so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

[1] Honorable John S. Rhoades, Sr., Senior United States District Judge for the Southern District of California, sitting by designation.

Supreme Court, U.S.
FILED
OCT 13 2005
OFFICE OF THE CLERK

No. 05-416

IN THE

Supreme Court of the United States

JEANNE S. WOODFORD
AND ANTHONY P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DONALD B. AYER
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

MEIR FEDER
(Counsel of Record)
CHARLES R.A. MORSE
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
Counsel for Respondent

October 13, 2005

QUESTION PRESENTED

Whether the court below properly declined to read a procedural default rule into the Prison Litigation Reform Act's exhaustion provision, 42 U.S.C. § 1997e(a), which states that a prisoner may not bring a federal action challenging prison conditions "until such administrative remedies as are available are exhausted" and makes no reference to procedural default.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

RESPONDENT'S BRIEF IN OPPOSITION 1

STATEMENT 2

REASONS FOR DENYING THE PETITION 7

I. THE QUESTION PRESENTED WOULD BENEFIT FROM FURTHER PERCOLATION. 8

II. THE NINTH CIRCUIT WAS CORRECT ON THE MERITS OF THE QUESTION PRESENTED. 10

III. IF, HOWEVER, THE COURT DECIDES THAT THE QUESTION PRESENTED MERITS REVIEW, THIS CASE PRESENTS THE BEST VEHICLE 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Booth v. Churner,
532 U.S. 731 (2001) 12, 13

EEOC v. Commercial Office Products Co.,
486 U.S. 107 (1988) 6, 12

Engle v. Isaac,
456 U.S. 107 (1982) 11

Franklin v. Johnson,
290 F.3d 1223 (9th Cir. 2002) 11

Giano v. Goord,
380 F.3d 670 (2d Cir. 2004) 8, 9

Gray v. Netherland,
518 U.S. 152 (1996) 11

Oscar Mayer & Co. v. Evans,
441 U.S. 750 (1979) 12

Harris v. Reed,
489 U.S. 255 (1989) 14

Jackson v. Johnson,
194 F.3d 641 (5th Cir. 1999) 11

Johnson v. Meadows,
418 F.3d 1152 (11th Cir. 2005) ..... *passim*

Lambrix v. Singletary,
520 U.S. 518 (1997) 14

Lee v. Kemna,
534 U.S. 362 (2002) 14

TABLE OF AUTHORITIES
(Continued)

Page

Porter v. Nussle,
534 U.S. 516 (2002) 7, 12, 13, 15

Pozo v. McCaughtry,
286 F.3d 1022 (7th Cir. 2002) 8, 9

Ross v. County of Bernalillo,
365 F.3d 1181 (10th Cir. 2004) 8

Spruill v. Gillis,
372 F.3d 218 (3d Cir. 2004) 8

Thomas v. Woolum,
337 F.3d 720 (6th Cir. 2003) 8, 12, 16

United States v. Wells,
519 U.S. 482 (1997) 11

Wainwright v. Sykes,
433 U.S. 72 (1977) 6, 14

Federal Statutes

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1997e(a) 1, 10, 12

28 U.S.C. § 2244(d)(2) 12

28 U.S.C. § 2254(d)(1) 15

State Statutes

Cal. Code Regs. tit. 15, § 3084.3(c) 15

TABLE OF AUTHORITIES
(Continued)

Page

Miscellaneous

Kermit Roosevelt III, Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error, 52 EMORY L.J. 1771 (2003) 15, 16

RESPONDENT'S BRIEF IN OPPOSITION

In this action under 42 U.S.C. § 1983, Respondent Viet Mike Ngo, seeking damages and equitable relief, alleges violations of his constitutional rights, principally in the form of restrictions preventing him from participating in religious, educational, and other prison programs. Reversing the district court, the Ninth Circuit properly declined to read a procedural default bar into the Prison Litigation Reform Act's ("PLRA") exhaustion provision (42 U.S.C. § 1997e(a)), and in particular declined to hold that Respondent had forever lost the right to pursue a federal civil rights action by virtue of having filed a prison grievance that prison administrators deemed to be outside the California prison system's 15-day deadline.

In so doing, the Ninth Circuit concededly deepened a circuit split on an important recurring question: whether the PLRA's exhaustion rule — that prisoners may not file suit "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) — incorporates an unwritten procedural default bar that permanently excludes from federal court claims rejected by prison administrators on procedural grounds. Five circuits (the Second, Third, Seventh, Tenth, and Eleventh) have held that the PLRA does incorporate such a bar, and two circuits (the Sixth and the court below) have held that there is no such bar. Respondent submits, however, that the time is not yet ripe for this Court's review, because five circuits have yet to address the issue and it would benefit from further percolation.

Furthermore, as explained in greater detail below, the Ninth Circuit's decision was correct on the merits.

Respondent notes that another pending petition for certiorari, from an Eleventh Circuit decision taking the majority side of the split, presents the same question as is at issue here. *See Johnson v. Meadows*, No. 05-6336. If this Court were to decide that, contrary to Respondent's contention, the issue is ripe for review. Respondent submits that his case is a better vehicle for addressing it than is *Johnson v. Meadows*. This case, unlike the *Johnson* case, presents the typical fact pattern — a prisoner files an untimely grievance, has it rejected, files suit in federal court, and faces the argument that he has defaulted his federal claim by failing to grieve in a timely fashion. In *Johnson*, in contrast, the prisoner made no effort to exhaust, bypassing the grievance process entirely; he availed himself of the grievance process only later, after the district court dismissed his initial suit. Moreover, the opinion below is more fully reasoned than the opinion in *Johnson*, which referred to the opposing authority only summarily.

STATEMENT

This case arises out of a series of events that began when Respondent Ngo was placed into administrative segregation at San Quentin State Prison in California on October 26, 2000, as punishment for alleged "inappropriate activity" with volunteer Catholic priests. Pet. App. 2.

On December 23, 2000, Ngo was released from administrative segregation, but Petitioner Kane, the Chief Deputy Warden, with the knowledge and approval of Petitioner Woodford, the Warden, prohibited him

from participating in any "Special Programs," including religious and educational programs, and from communicating with a particular volunteer in the San Quentin Catholic Chapel.

After an informal attempt to have the restrictions discontinued failed, Ngo submitted a formal appeal of this disciplinary action against him to the prison Appeals Coordinator. The Appeals Coordinator refused to accept it for filing on the ground that Ngo had not filed it within 15 days of "the event or decision being appealed," as required by California prison regulations. *Id.* at 3. The Appeals Coordinator also rejected, on the same grounds, a subsequent filing in which Ngo argued that his appeal was timely because the ongoing disciplinary action amounted to a series of continuing violations, the most recent of which had taken place less than 15 days before the filing date. *Id.*

On July 11, 2001, Ngo filed a verified complaint against Petitioners pursuant to 42 U.S.C. § 1983, alleging that Petitioners' conduct with respect to the disciplinary action and restrictions violated the First Amendment rights to free exercise of religion and free speech; denied him due process; and defamed him. Pet. App. 3. Ngo further alleged that he had exhausted all available administrative grievance procedures, noting that he had submitted two appeals but that the Appeals Coordinator had declared them untimely and refused to process them. *Id.* at 23.

Petitioners moved to dismiss the complaint, arguing, among other things, that Ngo's filing of the two grievances deemed untimely was insufficient to exhaust his administrative remedies in the prison grievance system, as required by the PLRA. *Id.* at 22. The District

Court granted the defendants' motion on failure-to-exhaust grounds. *Id.* at 25.

On appeal, Ngo argued that he had proceeded as far as he could go in the prison grievance system, and that the basis for the system's rejection of his claims — prison timeliness rules — was of no moment under the PLRA, which requires only that prison remedies be "exhausted." The Ninth Circuit (Pregerson, J.) agreed, expressly rejecting Petitioners' argument that, even though Ngo had no remaining remedies available in the prison grievance system, his allegedly untimely filing amounted to a failure to exhaust under the PLRA. The court reasoned that Petitioners' argument "confuses the doctrines of exhaustion and procedural default": Exhaustion, the Ninth Circuit explained, is a timing doctrine that merely "bars a remedy in federal court if one is still available in the state's administrative system," whereas procedural default permanently bars federal courts from considering claims that are procedurally barred in the state system. *Id.* at 9. The court then concluded that the PLRA contains only an exhaustion requirement, not a procedural default rule.

The Ninth Circuit recognized that the majority of circuits to address the issue have concluded that the PLRA should be read to include a procedural default rule, but — after carefully discussing the opinions of the Third, Sixth, Seventh, and Tenth Circuits, *id.* at 11-13 — aligned itself with the Sixth Circuit on the minority side of the circuit split. The court emphasized that whereas the plain language of the PLRA expressly requires exhaustion, nothing in the statute's language "mentions procedural default or indicates an intent to bar suits by prisoners who fail to meet administrative

time requirements." *Id.* at 15. The court also noted that the PLRA's use of the phrase "*until* such administrative remedies as are available are exhausted" indicated that Congress intended the exhaustion requirement as a *timing* rule (postponing a federal suit until the prisoner satisfied the exhaustion requirement), rather than as a complete bar to suit in federal court. *Id.* In addition, the court cited Ninth Circuit authority holding that "long-established differences between the exhaustion requirement and the procedural default doctrine preclude any conclusion that Congress implicitly intended to reach one by a statutory reference to the other." *Id.* at 18-19 (internal quotation marks omitted).

Furthermore, in addition to these arguments based on the language of the statute, the Ninth Circuit noted that engrafting a procedural default rule onto the PLRA's exhaustion requirement would have the effect of drastically reducing the limitations period for prisoner § 1983 actions. In California, the two-year § 1983 limitations period "would effectively shrink to fifteen working days" — the limit imposed in the prison grievance system. *Id.* at 20 & n.4. Moreover, allowing procedural defects to forever bar even meritorious claims would give prison administrators "an incentive to fashion grievance procedures which prevent or even defeat" such claims. *Id.* at 21. The court emphasized that the PLRA did not aim "simply to make things harder for inmates, irrespective of the merits of their claims." *Id.* at 20 n.4.

In declining to craft a procedural default rule, the Ninth Circuit rejected an analogy — relied upon by the circuits that have chosen to create such a rule — to the procedural default bar recognized in habeas corpus

cases, because "the reasons for utilizing procedural default doctrine in the habeas context are generally irrelevant to prisoner suits under the PLRA." *Id.* at 20. The court noted that the habeas procedural default rule "has its origins in the adequate and independent state ground doctrine," *id.* at 9, and in the fact that a habeas petition is a collateral attack on a state court judgment that may rest on such a ground. In this context, enforcing state procedural requirements is essential, because "the state criminal process should be the 'main event' rather than a 'tryout on the road' to a dispositive federal habeas hearing." *Id.* at 14 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)). Prisoners' § 1983 suits, in contrast, "do not collaterally attack a prison grievance proceeding," and it is the federal suit, not the grievance proceeding, that is the main event. Pet. App. 14. Moreover, unlike in habeas cases, where the procedural standards at issue are those of a state court system, "the standards governing suit in state or federal courts are not necessarily adhered to during prison grievance proceedings," and the proceedings "are not sufficiently judicial in nature to warrant preclusive effect at all." *Id.* at 15. The court ultimately determined that the PLRA requirement that plaintiffs exhaust prison administrative remedies is more similar to other administrative exhaustion requirements — where the Supreme Court has declined to "implant[]" a procedural default rule, *see, e.g., EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988) — than it is to habeas exhaustion. Pet. App. 18-20.

Finally, the Ninth Circuit rejected the policy argument, advanced by Petitioners and other circuits, that the absence of a procedural default rule would defeat the exhaustion requirement's purpose of allowing

corrections officials to "take 'corrective action . . . [that] might improve prison administration and satisfy the inmate.'" *Id.* at 16 (ellipsis and brackets in original) (quoting *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002)). Prisoners are unlikely to intentionally default their grievances, because the grievance process represents "the fastest route to a remedy." Pet. App. 16. And, in any case, "the inmate must still submit his untimely grievance" in order to exhaust, and that submission satisfies the PLRA goal of "allowing prison officials first crack at resolving prisoners' grievances," should they choose to accept the opportunity to hear the case on the merits. *Id.* at 17.

Following the Ninth Circuit's decision, Petitioners sought rehearing and rehearing *en banc*, both of which were denied by order dated July 1, 2005. *Id.* at 27.

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari should be denied. Respondent recognizes that the question presented is a significant one, and that there is a split on the issue that involves seven circuits. However, the split is of relatively recent vintage and five circuits have yet to decide the issue. For that reason, the question could benefit from further percolation. Further, the decision below is correct on the merits.

Respondent notes, however, that there is another pending petition presenting the same issue — *Johnson v. Meadows*, No. 05-6336, a case from the Eleventh Circuit. Should the Court determine that the issue is worthy of review at this time, Respondent submits that his case is a better vehicle for addressing the question than is *Johnson*. This case presents a more typical fact

pattern than *Johnson*, in which the petitioner filed suit before making any effort to file a grievance in the prison system. Moreover, the opinion below is more fully reasoned than the opinion in *Johnson*, which referred to the opposing authority only summarily.

I. THE QUESTION PRESENTED WOULD BENEFIT FROM FURTHER PERCOLATION.

Petitioners are correct that the federal courts of appeals are divided over the question whether "a procedural-default bar should be read into the Prison Litigation Reform Act's exhaustion requirement." Pet. 5. Indeed, the split is somewhat broader than Petitioners suggest. Besides the Sixth and Ninth Circuits, which have declined to read a procedural default requirement into the statute (*see Thomas v. Woolum*, 337 F.3d 720, 731-33 (6th Cir. 2003); Pet. App. 20-21) and the Third, Seventh, Tenth, and Eleventh Circuits, which have grafted a procedural default requirement onto the statute (*see Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004); *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004); *Johnson v. Meadows*, 418 F.3d 1152, 1158-59 (11th Cir. 2005)), the Second Circuit has joined the majority side of the split (*see Giano v. Goord*, 380 F.3d 670, 677-78 (2d Cir. 2004)).

But, while the split is fairly broad, it is not fully mature. The first case addressing the question was *Pozo v. McCaughtry*, which the Seventh Circuit decided in April 2002. The Sixth Circuit parted company with the Seventh in July 2003 in *Thomas v. Woolum*. The split is thus only a little over two years old. Although seven circuits have taken positions on the issue, there remain five circuits (the First, Fourth, Fifth, Eighth, and D.C.

Circuits) that have yet to address it. Given the frequency with which the issue has been addressed since *Pozo* was decided in 2002, it seems likely that several of the remaining circuits will be presented with the issue in the near future.

Moreover, the courts on the majority side of the split have not fully worked out all of the consequences of the procedural default rule they have recognized — in particular, whether and how a procedural default might be excused. At least three courts have noted this additional question, but only the Second Circuit in *Giano* has gone on to address it. *See Pozo*, 286 F.3d at 1025 (reserving "the question whether plain-error review or other merits-linked doctrines that may relax procedural rules can relieve a defendant of a default in the state's process"); *Giano*, 380 F.3d at 677-80 (noting that "'[s]pecial circumstances' may exist that amount to a 'justification' for not complying with administrative procedural requirements"); Pet. App. 21 n.5 (observing that a procedural default doctrine would require development of a "standard of review" for determining whether the prison authorities had properly found a default). And even the Second Circuit declined to "attempt any broad statement of what constitutes justification" for failing to exhaust. *Giano*, 380 F.3d at 678. If further percolation were permitted, the circuits recognizing a procedural default rule might ameliorate the effects of that rule — and thereby reduce the consequences of the circuit split, and the need for this Court to address it — by adopting a relatively permissive standard for excusing such defaults.

Accordingly, the Court should deny certiorari in both this case and *Johnson v. Meadows*, which presents the same issue.

II. THE NINTH CIRCUIT WAS CORRECT ON THE MERITS OF THE QUESTION PRESENTED.

Petitioners are incorrect in suggesting that this Court should grant review to correct the Ninth Circuit's purportedly erroneous ruling in this case. The Ninth Circuit was correct in concluding that it would be inappropriate to add a judicially created procedural default rule to the PLRA's exhaustion requirement.

Most importantly, there is nothing in the plain language of the PLRA to support such a rule. Under the PLRA, "[n]o action shall be brought with respect to prison conditions . . . by a prisoner confined in any . . . correctional facility *until such administrative remedies as are available are exhausted.*" 42 U.S.C. § 1997e(a) (emphasis added). The PLRA thus specifically creates an exhaustion requirement, and conspicuously fails to create a procedural default bar. Indeed, Petitioners recognize that what they seek is the judicial creation of a rule that cannot be found in the language of the statute — as they say at more than one point in the petition, what they are asking this Court to do is "read [a procedural default bar] into the Prison Litigation Reform Act's exhaustion requirement." Pet. 5; *see also id.* at 6 ("[T]he Sixth and Ninth Circuits have declined to read a procedural-default mechanism into the Prison Litigation Reform Act."). Petitioners cite no authority for the proposition that the courts may add procedural hurdles to § 1983 above and beyond what Congress chose to impose.

Nor is there any basis for arguing that Congress failed to mention procedural default because it intended the term "exhausted" to incorporate, *sub silentio*, a procedural default rule. It is well-established that "[e]xhaustion and procedural default are distinct concepts .... The two doctrines developed independently and on different grounds, apply in different situations, and lead to different consequences." *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002); *see, e.g., Engle v. Isaac*, 456 U.S. 107, 125-26 n.28 (1982); *Jackson v. Johnson*, 194 F.3d 641, 652 n.35 (5th Cir. 1999).[1] In light of this well-established distinction, it is clear that Congress intended its use of the term "exhausted" to mean just that — exhaustion, not procedural default. See *United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents.").

---

[1] Exhaustion refers to a requirement that the claimant use all available state remedies, a requirement that is satisfied once no further state remedies are available — no matter what caused the remedies to be unavailable. For example, in the habeas corpus context, the exhaustion requirement is satisfied — and does not bar a claim — when state courts reject the claim for failure to satisfy state procedural requirements. As this Court has explained, "[b]ecause this [exhaustion] requirement ... refers only to remedies still available at the time of the federal petition, it is satisfied if it is clear that the habeas petitioner's claims are now procedurally barred under state law." *Gray v. Netherland*, 518 U.S. 152, 161 (1996) (internal quotation and brackets omitted). The procedural default doctrine, in contrast, does bar claims that have been defaulted for failure to satisfy state procedural requirements, such as timeliness requirements. *Id.* at 162.

Moreover, as the Sixth Circuit observed in *Thomas v. Woolum*, had Congress desired to incorporate a procedural default rule, it could easily have done so:

> With the PLRA, Congress could have required more than an exhaustion requirement, but it chose not to. Congress could have, for example, required in § 1997e(a) that, "In exhausting available administrative remedies, the prisoner shall comply with the prison's reasonable time limits for filing grievances. Untimely claims shall be deemed procedurally defaulted."

337 F.3d at 731. Likewise, Congress could easily have required that prisoner claims be "*properly* exhausted," but chose not to do so. *See, e.g.*, 28 U.S.C. § 2244(d)(2) (expressly providing that tolling provision applies only during the pendency of a "properly filed" application for state relief); *see also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 759 (1979) (declining, in the absence of any reference to timeliness in the statute, to import a timeliness requirement into Age Discrimination in Employment Act provision requiring presentation of grievances to state agency before filing federal suit); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1988) (same result under Title VII: "Title VII, like the ADEA, contains no express reference to timeliness under state law").

Instead of addressing the plain language of the PLRA, Petitioners argue that the Ninth Circuit's decision is somehow inconsistent with this Court's two opinions rejecting proposed exceptions to the PLRA exhaustion requirement — *Booth v. Churner*, 532 U.S. 731 (2001) (no futility exception), and *Porter v. Nussle*, 534 U.S. 516 (2002) (no exception for incidents affecting "only

particular prisoners" rather than "prisoners generally"). Pet. 6-9. However, the decision below had nothing to do with creating an exception to the exhaustion requirement,[2] and neither *Booth* nor *Porter* says anything about a procedural default rule. Indeed, both cases, if anything, support Respondent's position, because both rely on requirements set forth in the express language of the PLRA. *See Booth*, 532 U.S. at 738-40; *Porter*, 534 U.S. at 528. Here, the procedural default mechanism the defendants seek is contained nowhere in the plain language of the PLRA.

Nor can Petitioners find support in this Court's creation of a procedural default rule in the habeas context. In the habeas context, unlike here, the requirements of the cause of action were largely developed by the courts without specific statutory guidance. Here, in contrast, there is a statute in which Congress has specifically prescribed what procedural hurdles the prisoner must satisfy — to wit, exhaustion *simpliciter* — and nothing indicating a delegation of authority to the courts to add additional requirements.

Moreover, even if that were not the case, the Ninth Circuit was correct in recognizing that the basis for the habeas procedural default rule has no application here. In habeas cases, which are collateral attacks on state court judgments, the rule "has its historical and theoretical basis in the 'adequate and independent state

---

[2] The Ninth Circuit, far from relying on an exception to the exhaustion requirement, expressly found that "Ngo *exhausted* all administrative remedies available to him . . . when he completed all avenues of administrative review available to him." Pet. App. 21 (emphasis added).

ground' doctrine." *Harris v. Reed*, 489 U.S. 255, 260 (1989)); *accord Lee v. Kemna*, 534 U.S. 362, 375 (2002). That doctrine is important in habeas cases because it helps to ensure — by requiring criminal defendants to properly present all of their claims in the state courts, on pain of procedural default — that it is the state-court trial that is (as it is supposed to be) "the 'main event,' . . . rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). Applying that doctrine also helps to prevent the anomalous result that "a federal district court or court of appeals would be able to review claims that [the Supreme Court] would have been unable to consider on direct review." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) (citing *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991)).

None of these considerations applies in the PLRA context. A suit by a prisoner pursuant to § 1983 is not an attack on a state judgment, and accordingly there is no concern that the federal court is reviewing a judgment that rests on an adequate and independent state ground and/or would not have been reviewable on direct review. Moreover, it is quite clear that under the PLRA, the prison administrative process that must be exhausted is not designed to be the "main event," and the § 1983 action a mere review of that determination. It is the § 1983 action — the *federal* suit — that is the main event, and it is entirely independent of the prison grievance proceedings: as the Ninth Circuit noted, the "[p]rison grievance proceedings are not sufficiently judicial in nature to warrant preclusive effect." Pet. App. 15. In short, the reasons that compelled the creation of a

procedural default doctrine in habeas law have no application to the PLRA.

Finally, Petitioners' policy argument — that the PLRA exhaustion requirement will be rendered meaningless if prisoners are permitted to "'exhaust' administrative remedies by disregarding them." Pet. 8 — does not withstand scrutiny. As an initial matter, a prisoner has no strategic incentive to "disregard[]" the prison grievance process, because the result of that process, unlike a state-court ruling in the habeas context (*see* 28 U.S.C. § 2254(d)(1)), receives no deference in and has no effect on the subsequent § 1983 suit. *See* Pet. App. 15; *see also* Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequences of Procedural Error*, 52 EMORY L.J. 1771, 1810 (2003) ("Withholding a claim or sandbagging in the administrative proceeding offers inmates no strategic benefit.").

In any event, even an inmate who for some reason *wants* to evade the administrative process does not have it in his power to do so; the exhaustion requirement means that even an untimely prisoner must still file his grievance before proceeding to court, and prison officials are thereby given, if they want it, what is important under the PLRA: the "*opportunity* to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. at 525 (emphasis added). For example, in this case, under Cal. Code Regs. tit. 15, § 3084.3(c), "the Appeals Coordinator *could* have considered Ngo's appeal: [h]e

was authorized to do so by the grievance regulations, but elected not to." Pet. App. 17 (emphasis in original).[3]

Moreover, significant policy concerns cut *against* judicially creating a procedural default rule. As the Ninth Circuit recognized, the short prison administrative deadlines in California (as in many states) would effectively impose a 15-working-day statute of limitations on prisoners' § 1983 actions, instead of the longer limitations periods that normally apply. This would necessarily result in the non-merits forfeiture of many claims, particularly in view of the fact that inmates navigating the administrative grievance process are almost inevitably proceeding without the guidance of counsel. There is no indication that Congress intended the PLRA to result in such a wholesale forfeiture of claims. Pet. App. 19-20. Had that been Congress's intent, it could have directly imposed a draconian statute of limitations on prisoner suits.[4]

The creation of a procedural default rule would also create a perverse incentive for prison officials (who are potential defendants) to defeat § 1983 claims by making procedural requirements as onerous as possible. *See Thomas v. Woolum*, 337 F.3d at 729 n.3 (such "incentives . . . would likely lead to shorter and shorter

---

[3] The same discretion is available under most, if not all, state prison grievance systems. *See* Roosevelt, *supra*, at 1810.

[4] Moreover, the inmates most likely to fall into procedural error are first-time litigants, who are *least* likely to file the frivolous claims about which Congress was concerned. More litigious inmates will have greater knowledge of the system and be much more likely to satisfy procedural requirements. *Cf.* Pet. App. 29 (scheme "would penalize the less sophisticated and less informed").

limitations periods"). Inmates' rights under § 1983 would become subject to any procedural requirement administrators choose to insist on, no matter how arbitrary or unfair. Again, there is no indication that Congress intended to create any such regime.

In sum, it is clear that Congress's statutory imposition of an exhaustion requirement does not, *sub silentio*, create a procedural default rule: that the reasons for the procedural default doctrine in habeas corpus do not apply to the PLRA; and that the absence of a procedural default provision does not even remotely render the PLRA exhaustion requirement "meaningless."

III. IF, HOWEVER, THE COURT DECIDES THAT THE QUESTION PRESENTED MERITS REVIEW, THIS CASE PRESENTS THE BEST VEHICLE.

If this Court determines, contrary to Respondent's contention, that the question presented is ripe for this Court's review, Respondent submits that his case is the appropriate vehicle for that review. There is another pending petition that presents the same question — *Johnson v. Meadows*, No. 05-6336, which arises from *Johnson v. Meadows*, 418 F.3d 1152 (11th Cir. 2005), a decision on the majority side of the circuit split — but that case is not as suitable a vehicle.

One important distinction is that this case presents what might be called the ordinary factual situation. Respondent attempted to file prison grievances before proceeding to federal court, and filed his § 1983 action only after the prison Appeals Coordinator rejected those grievances. Pet. App. 3. In the *Johnson* case, the prisoner filed his first federal lawsuit without even attempting to avail himself of the prison grievance

system. 418 F.3d at 1154. He attempted to exhaust only after the district court dismissed his complaint for bypassing the prison grievance system. *Id.*

This distinction is significant, because it is possible that the Court could conclude that the *Johnson* petitioner's complete bypass of administrative remedies before filing his first lawsuit — a true failure to exhaustion — should have resulted in a dismissal with prejudice.[5] In that event, the Court might not reach the question presented. In this case, in contrast, the facts inescapably present the question whether a procedural default requirement should be read into the PLRA.

Moreover, the Ninth Circuit's opinion below addresses and discusses the reasoning of the case law on

---

[5] It is worth noting that this bypass contradicts the *Johnson* petition's contention that that case presents the Court with a unique opportunity to address what it calls a separate "'good faith exhaustion' rule advanced by the Second Circuit." Petition for Certiorari at 19-20, *Johnson v. Meadows*, No. 05-6336. As an initial matter, the Second Circuit's position on the question presented here is no different from the position of the Third, Seventh, Tenth, and Eleventh Circuits: As indicated earlier, *supra* at 8-9, the Second Circuit reads the PLRA as including a procedural default rule, and its discussion of good faith justification for failing to exhaust relates only to the further question of when a failure to exhaust will be excused. *See, e.g., Johnson*, 418 F.3d at 1158 (citing Second Circuit opinion in *Giano v. Goord* as one of the cases recognizing procedural default rule).

In any event, Johnson's complete bypass of the prison grievance system is inconsistent with good faith, and the Eleventh Circuit specifically found that his failure to exhaust was "without good cause." 418 F.3d at 1159. If anything, it is Respondent's case that reflects a good-faith effort to comply with the prison grievance system, as the Ninth Circuit found that "Ngo gave the prison grievance process a chance to work; indeed, it's debatable whether his appeal was even untimely." Pet. App. 17.

both sides of the circuit split. Pet. App. 11-13, and thereby provides a fully-considered opinion for review. The Ninth Circuit also considered, and denied, *en banc* review. In contrast, the Eleventh Circuit's opinion in *Johnson* relegates the opposing authority to a brief "but see" citation. 418 F.3d at 1158, and the full court was never asked to consider *en banc* review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. AYER
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

MEIR FEDER
(Counsel of Record)
CHARLES R.A. MORSE
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

Counsel for Respondent

October 13, 2005

3

Supreme Court, U.S.
FILED
OCT 31
[illegible] - 2005
OFFICE OF THE CLERK

No. 05-416

NOV 10 PAGE 2

IN THE

Supreme Court of the United States

JEANNE S. WOODFORD and ANTHONY P. KANE,

Petitioners,

v.

CORRECTED COPY

VIET MIKE NGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, ARIZONA, ARKANSAS, COLORADO, GEORGIA, HAWAII, IDAHO, KANSAS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, UTAH, VERMONT, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF THE PETITION

CORRECTED COPY

ELIOT SPITZER
Attorney General of the State of New York
CAITLIN J. HALLIGAN*
Solicitor General
ROBERT H. EASTON
Deputy Solicitor General
RICHARD DEARING
Assistant Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8016

* *Counsel of Record*

Attorneys for Amicus Curiae

(Additional Counsel Listed on Signature Page)

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. A Procedural Default Rule is Necessary for the PLRA's Exhaustion Requirement to Serve Its Intended Purposes.	5
II. The Ninth Circuit's Analysis of the PLRA's Exhaustion Requirement Cannot Be Squared with Congressional Intent.	10
CONCLUSION	15

TABLE OF CITED AUTHORITIES

Cases *Page*

Booth v. Churner,
532 U.S. 731 (2001) 7, 8, 9, 11

Brown v. Valoff,
422 F.3d 926 (9th Cir. 2005) 12

Edwards v. Carpenter,
529 U.S. 446 (2000) 5

Hartsfield v. Vidor,
199 F.3d 305 (6th Cir. 1999) 12

Johnson v. Meadows,
418 F.3d 1152 (11th Cir. 2005) 2, 3

Matter of Patterson v. Smith,
53 N.Y.2d 98 (1981) 14

McCarthy v. Madigan,
503 U.S. 140 (1992) 8, 14

O'Sullivan v. Boerckel,
526 U.S. 838 (1999) 5

Porter v. Nussle,
534 U.S. 516 (2002) ..... *passim*

Pozo v. McCaughtry,
286 F.3d 1022 (7th Cir. 2002) 2, 8, 9, 10

Cited Authorities

Page

Preiser v. Rodriguez,
411 U.S. 475 (1973) 14

Ross v. County of Bernalillo,
365 F.3d 1181 (10th Cir. 2004) 2, 8

Spruill v. Gillis,
372 F.3d 218 (3d Cir. 2004) 2, 9

Thomas v. Woolum,
337 F.3d 720 (6th Cir. 2003) ..... *passim*

United States v. L.A. Tucker Truck Lines, Inc.,
344 U.S. 33 (1952) 5

Williams v. Comstock,
___ F.3d ___, 2005 U.S. App. LEXIS 21086
(2d Cir. Sept. 29, 2005) 2

Federal Statutes and Regulations

28 U.S.C. § 1915 7

28 U.S.C. § 2254 5

42 U.S.C. § 1997e 1, 2, 6, 12

28 C.F.R. § 542.14 ..... 3, 8, 11

Cited Authorities

Page

State Regulations

7 N.Y.C.R.R. § 701.7(a)(1) 3, 8, 11

Cal. Code Regs. tit. 15, § 3084.3 8

Cal. Code Regs. tit. 15, § 3084.6 3

Colo. Dep't of Corrs., Admin. Reg. No. 850-04(IV)(D)(1)(a), *available at* http://www.docs.state.co.us/admin_reg/PDFs/0850_04.pdf (last visited Oct. 31, 2005) 3

Fla. Admin. Code Ann. r. 33-103.011(b) 3

Kan. Admin. Regs. § 44-15-101b 3

La. Admin. Code tit. 22, § 325(A)(2) 3

Md. Regs. Code tit. 12, § 12.07.01.06(A) 3

Neb. Admin. Code tit. 68, ch. 2, § 004.01 3

Ohio Admin. Code § 5120-9-31(J)(1) 3, 11

R.I. Code R. 06 070 002(10) 3

W. Va. Code St. R. § 90-9-3.1.1 3

Wis. Admin. Code DOC 310.09(b) 3

Cited Authorities

Page

Other Authorities

141 Cong. Rec. H14105 (daily ed. Dec. 6, 1995) .. 7

141 Cong. Rec. S7523 (daily ed. May 15, 1995) .. 6, 7

141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) 6, 15

Alaska Dep't of Corrs., Policies and Procedures, ch. 808, index no. 808.03, *available at* http://www.correct.state.ak.us/corrections/pnp/pdf/808.03.pdf (last visited Oct. 31, 2005) 3

Conn. Dep't of Corrs., Admin. Directive 9.6(10)(D), *available at* http://www.ct.gov/LIB/doc/PDF/AD/ad0906.pdf (last visited Oct. 31, 2005) 3

Ga. Dep't of Corrs. S.O.P. IIBOD-0001 (2001) ... 3

Idaho Dep't of Corrs., Policy No. 316 § 05.03.00, *available at* http://www.corrections.state.id.us/policy/int316.pdf (last visited Oct. 31, 2005) 3

N.Y. Dep't of Corr. Servs., Inmate Grievance Program Annual Report (2004) 13

STATEMENT OF INTEREST OF AMICI CURIAE

The statutory exhaustion requirement at issue in this case mandates exhaustion of administrative remedies in all actions brought by inmates "with respect to prison conditions." Prison Litigation Reform Act of 1995 ("PLRA"), Pub. L. No. 104-134, § 803(d), 110 Stat. 1321-66, 1321-71 (1996), codified at 42 U.S.C. § 1997e(a).[1] In enacting the PLRA, which expanded the scope of the exhaustion requirement for suits brought by prisoners and made exhaustion mandatory in such actions, Congress sought to significantly enhance the ability of amici States to use their prison grievance procedures as a tool for safe and effective prison administration, as well as to reduce the number of prisoner lawsuits.

For decades, prison grievance procedures have played an important role in prison administration. Inmate grievances provide timely feedback to state officials about problems that arise in correctional facilities. In individual cases, grievance procedures enable prison administrators to take prompt remedial action that may satisfy the inmate and obviate the need for litigation. From a systemic perspective, such procedures allow prison officials to monitor trends in prisoner complaints before unwise institutional policies or patterns of inappropriate conduct by correctional officers lead to frustration among the inmate population, potentially triggering prisoner unrest or disturbances. Grievance

---

1. Section 1997e(a) provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

procedures also allow state officials to create factual records of any disputes that may eventually be litigated in court, and to filter out meritless inmate claims, thereby reducing the States' costs of defending against frivolous prisoner litigation.

By putting States to the choice of foregoing either full exhaustion or timely filing of inmate grievances, the decision below, if not reviewed and reversed by this Court, will seriously compromise the efficacy of amici States' prison grievance procedures.

SUMMARY OF ARGUMENT

This case presents the important question whether an inmate who files an untimely administrative grievance that prison officials properly reject on that ground has nevertheless exhausted his available administrative remedies within the meaning of 42 U.S.C. § 1997e(a). Put another way, the issue is whether the PLRA exhaustion requirement includes a "procedural default" component.

The Second, Third, Seventh, Tenth, and Eleventh Circuit Courts of Appeal have concluded that the Congressional purposes underlying § 1997e(a) are better served by applying a procedural default rule. *See Williams v. Comstock*, __ F.3d __, 2005 U.S. App. LEXIS 21086 (2d Cir. Sept. 29, 2005); *Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004); *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004); *Johnson v. Meadows*, 418 F.3d 1152, 1159 (11th Cir. 2005).[2]

2. A petition for certiorari from the Eleventh Circuit's decision in *Johnson* is pending before the Court. *See Johnson v. Meadows*, No. 05-6336. The instant petition presents a better vehicle for this (Cont'd)

On the other hand, the Sixth and, in the decision below, Ninth Circuits have concluded that the timeliness of an inmate's grievance is essentially irrelevant to the PLRA's exhaustion requirement. Pet. App. 1-21; *Thomas v. Woolum*, 337 F.3d 720, 735 (6th Cir. 2003). This deep and growing conflict, addressed at length in California's petition for certiorari, warrants immediate review by this Court.

Amici States seek here to address a separate factor that makes this petition cert-worthy: the substantial public

---

(Cont'd)
Court's review of the question presented because the administrative deadlines of California's prison grievance system are more representative of those nationwide than are the deadlines of Georgia's prisons at issue in *Johnson*. *Compare, e.g.*, Cal. Code Regs. tit. 15, § 3084.6(c) (15 working days); Fla. Admin. Code Ann. r. 33-103.011(b) (15 calendar days); Kan. Admin. Regs. § 44-15-101b (15 business days); La. Admin. Code tit. 22, § 325(A)(2) (30 days); Md. Regs. Code tit. 12, § 12.07.01.06(A) (same); 7 N.Y.C.R.R. § 701.7(a)(1) (14 calendar days); Ohio Admin. Code § 5120-9-31(J)(1) (same); W. Va. Code St. R. § 90-9-3.1.1 (15 days); Wis. Admin. Code DOC 310.09(b) (14 calendar days); Alaska Dep't of Corrs., Policies and Procedures, ch. 808, index no. 808.03, at 2, *available at* http://www.correct.state.ak.us/corrections/pnp/pdf/808.03.pdf (last visited Oct. 31, 2005) (30 days); Colo. Dep't of Corrs., Admin. Reg. No. 850-04(IV)(D)(1)(a), at 6, *available at* http://www.docs.state.co.us/admin_reg/PDFs/0850_04.pdf (last visited Oct. 31, 2005) (30 days); Conn. Dep't of Corrs., Admin. Directive 9.6(10)(D), at 4, *available at* http://www.ct.gov/LIB/doc/PDF/AD/ad0906.pdf (last visited Oct. 31, 2005) (30 days); Idaho Dep't of Corrs., Policy No. 316 § 05.03.00, at 3, *available at* http://www.corrections.state.id.us/policy/int316.pdf (last visited Oct. 31, 2005) (15 days); 28 C.F.R. § 542.14(a) (20 calendar days); *with* Ga. Dep't of Corrs. S.O.P. IIBOD-0001 (2001) (five days); Neb. Admin. Code tit. 68, ch. 2, § 004.01 (three calendar days); R.I. Code R. 06 070 002(10) (three days).

importance of clarifying the meaning of the PLRA's exhaustion requirement. In the Ninth Circuit's view, all that this provision requires is that prison officials receive some "opportunity" to address an inmate's complaints, Pet. App. 17, regardless of whether the inmate complies with the prison's procedural rules. That position cannot be squared with the policies underlying the PLRA's exhaustion requirement, which unmistakably indicate that failure to timely grieve a dispute should generally constitute a procedural default that bars litigation of a claim.

This Court has explained that an inmate's use of prison grievance procedures helps to "reduce the quantity and improve the quality" of prisoner litigation by filtering out some claims and facilitating the development of a factual record for claims that do wind up in litigation. *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). Since those benefits are realized only when grievances are considered by prison officials on the merits, it follows that the exhaustion requirement meant to create strong incentives for inmates to file timely grievances likely to result in such merits consideration. The Ninth Circuit's rule would nullify these incentives by treating timely and untimely grievances as equally acceptable ways for an inmate to exhaust administrative remedies.

Further, under the Ninth Circuit's cramped reading, the PLRA's exhaustion requirement would have the perverse effect of impairing, rather than enhancing, the utility of prison grievance systems as a tool for prison management. Deadlines are essential to the operation of prison grievance procedures — they facilitate prompt investigation and resolution of grievances, allow for swift remedial responses, and ensure that prison officials receive timely information about prisoner

complaints before inmate dissatisfaction leads to unrest. The Ninth Circuit's rule confronts prison officials with two equally bad alternatives: they can either continue to enforce those critical administrative deadlines but forego the right to a prisoner's exhaustion of administrative remedies prior to filing suit, or, alternatively, routinely consider inmate grievances on the merits regardless of how untimely they may be filed. This Court should grant California's petition for certiorari to confirm that the PLRA does not require this illogical result.

ARGUMENT

I. A Procedural Default Rule is Necessary for the PLRA's Exhaustion Requirement to Serve Its Intended Purposes.

Courts commonly apply procedural default rules to preserve the effectiveness of exhaustion requirements. Thus, in habeas corpus cases, this Court considers a procedural default rule necessary "to protect the integrity" of the exhaustion requirement set forth in 28 U.S.C. § 2254. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *see also Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000) (noting "the inseparability of the exhaustion rule and the procedural-default doctrine"). Likewise, where the law mandates exhaustion of administrative remedies, the general rule is that a litigant forfeits claims by failing to raise them in a timely fashion before the administrative agency. *See, e.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). As the majority of courts have recognized, *see supra* at 2-3, the PLRA's exhaustion requirement will be largely rendered toothless unless it is similarly construed to include a procedural default component.

The PLRA's core objective is to reduce the burden that prisoner litigation places on the courts. Its enactment was spurred by the "alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners," with inmate filings having risen "from 6,600 in 1975 to more than 39,000 in 1994." 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole). According to bill sponsors, "[f]rivolous lawsuits filed by prisoners tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population." 141 Cong. Rec. S7523, S7524 (daily ed. May 25, 1995) (statement of Sen. Dole); *see also id.* at S7526 (statement of Sen. Kyl) ("[I]nmate suits are clogging the courts and draining precious judicial resources."). By enacting the PLRA, Congress aimed to "help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits." 141 Cong. Rec. S14413, S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch); *see also id.* at S14414 (statement of Sen. Dole) ("If enacted, [the PLRA] would go a long way to take the frivolity out of frivolous inmate litigation.").

"Beyond doubt," Congress meant for the strict, mandatory exhaustion requirement of § 1997e(a) "to reduce the quantity and improve the quality of prisoner suits." *Porter*, 534 U.S. at 524-525. The exhaustion requirement serves this end by "afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Id.* at 525. Funneling prisoner complaints into the administrative grievance process has several benefits. First, "corrective action taken [by prison officials] in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby

obviating the need for litigation." *Id.*; *accord Booth v. Churner*, 532 U.S. 731, 737 (2001).[3] Second, "internal review might 'filter out some frivolous claims'," *Porter*, 534 U.S. at 525 (quoting *Booth*, 532 U.S. at 737) — for example, by satisfying the inmate's desire to have his complaint heard, or by offering the inmate a persuasive explanation why the claim is baseless.[4] Third, "for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy." *Porter*, 534 U.S. at 525; *see also* 141 Cong. Rec. H14078, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo) (explaining that "new administrative exhaustion language" would "provide some degree of fact-finding so that when or

---

3. Many inmate complaints may have merit if cast as administrative grievances, but nevertheless may be frivolous when framed as a constitutional claim in a § 1983 suit or *Bivens* action. Directing such complaints into the prison grievance process serves the dual purposes of ensuring that those grievances are first heard in the forum that can most effectively address them and reducing the burden of frivolous prisoner litigation on the courts. 141 Cong. Rec. S7523, S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl) ("Many prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an adequate remedy.").

4. Another PLRA provision, 28 U.S.C. § 1915(g), generally disqualifies from in forma pauperis status an inmate who has had three or more lawsuits dismissed "on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." Accordingly, if the administrative review process convinces the inmate that a grievance is likely frivolous, the inmate has good reason not to pursue a lawsuit, since a resulting dismissal may jeopardize his future eligibility for in forma pauperis status for other complaints with more merit.

if the matter reaches Federal court there will be a record upon which to proceed in a more efficient manner").[5]

Plainly, for the administrative grievance process to provide these benefits, a grievance filing must result in an investigation and resolution of the grievance by prison officials *on the merits*. As a category, late administrative grievances that are dismissed for untimeliness carry no possibility of (1) triggering corrective action that satisfies the inmate without litigation; (2) filtering out frivolous claims; or (3) developing a factual record that defines and narrows disputed issues in advance of federal litigation.[6]

---

5. Before the PLRA's enactment, this Court declined to create by judicial decision an exhaustion requirement for Bivens actions brought by federal inmates. *See McCarthy v. Madigan*, 503 U.S. 140 (1992). In concluding that the costs of such an exhaustion requirement would outweigh its benefits, this Court *assumed* that any exhaustion requirement would necessarily include a procedural default rule. *Id.* at 152 (noting that an exhaustion requirement would create a "risk of forfeiture" by inmates' failures to meet administrative filing deadlines). By enacting the PLRA, Congress overruled *McCarthy*, leading this Court to observe that Congress "may well have thought" the *McCarthy* analysis "shortsighted" in discounting the benefits of exhaustion. *Booth*, 532 U.S. at 737.

6. Many prison grievance procedures provide that prison officials may excuse untimely filings upon a proper showing. *See, e.g.*, 7 N.Y.C.R.R. § 701.7(a)(1) note; 28 C.F.R. § 542.14(b); *see also* Cal. Code Regs. tit. 15, § 3084.3(c)(6) (providing that an administrative appeal "may be rejected" for untimeliness). Where prison officials accept a late filing and address it on the merits, it is appropriate to consider that filing "timely" for the purpose of the PLRA exhaustion requirement since, in such cases, the goals of exhaustion are fully served. *See Ross*, 365 F.3d at 1186; *Pozo*, 286 F.3d at 1025.

Accordingly, the PLRA's exhaustion requirement can succeed in reducing the burden of inmate litigation on federal caseloads only to the extent that it increases the proportion of inmate complaints that are resolved on the merits through the administrative grievance process. *See Thomas*, 337 F.3d at 738 (Rosen, J., dissenting in part) ("[T]he core purpose of § 1997e(a)'s exhaustion requirement is to ensure that prisoner grievances are resolved administratively to the greatest extent possible."). A procedural default rule is well adapted to that end, since it creates "an overwhelming incentive for a prisoner to pursue his claims to the fullest with[in] the administrative grievance system," *Spruill*, 372 F.3d at 230, and to do so in such a manner that prison officials are likely to address the claims on the merits. By contrast, the Ninth Circuit's holding that even untimely administrative filings can suffice to exhaust remedies all but nullifies the statute's effect on inmates' incentives to file a timely grievance, and, as a consequence, significantly diminishes the provision's effectiveness to direct prisoner complaints into the grievance process for merits consideration. *See Pozo*, 286 F.3d at 1025 (If "prisoners need not file timely complaints and appeals, then the incentive that § 1997e(a) provides for prisoners to use the state process will disappear.").

In its recent PLRA exhaustion decisions, this Court has unanimously turned back inmates' efforts to create exceptions that would allow them to evade the statute's strict exhaustion mandate. Thus, *Booth* rejected as "highly implausible" a reading of § 1997e(a) that would "give prisoners a strong inducement to skip the administrative process" by fashioning their complaint to seek monetary relief that was unavailable through prison grievance procedures. 532 U.S. at 741. Similarly, in *Porter*, this Court declined to adopt an exception

to the exhaustion requirement for prisoner complaints alleging "isolated episodes" of misconduct by corrections officers, thinking it "unlikely that Congress, when it included in the PLRA a firm exhaustion requirement, meant to leave the need to exhaust at the pleader's option." 534 U.S. at 530.

The Ninth Circuit's holding exhibits a similar flaw. While its rule does not excuse an inmate from making at least some attempt at exhaustion, it gives the inmate the option of only nominally satisfying the requirement through the empty formality of a long-untimely administrative filing — an avenue that is little better than dispensing with the exhaustion requirement in its entirety. The PLRA exhaustion requirement reflects a clear Congressional desire for inmate grievances to be resolved on the merits through administrative processes. The Ninth Circuit's approach undermines that goal, and "leave[s] § 1997e(a) without any oomph." *Pozo*, 286 F.3d at 1025. This Court should grant certiorari to ensure that the PLRA can serve its intended goals.

II. The Ninth Circuit's Analysis of the PLRA's Exhaustion Requirement Cannot Be Squared with Congressional Intent.

The Ninth Circuit's analysis proceeds from the false premise that the sole purpose of the PLRA exhaustion requirement is to allow prison officials *some* opportunity to address grievances internally, regardless of whether that opportunity accords with the procedural rules of the prison's grievance resolution system. The court of appeals gave great weight to the fact that California's prison grievance procedures, like those of many other correctional systems,

allow prison officials some discretion to excuse untimeliness and reach the merits of a late-filed grievance.[7]

Thus, in the Ninth Circuit's view, "[h]olding that the PLRA does not contain a procedural default bar . . . would in no way obstruct the goal of allowing prison officials first crack at resolving prison grievances. It is for the prison to decide whether to exercise its discretion and accept or refuse the opportunity to hear the case on the merits regardless whether the grievance is timely filed." Pet. App. 17. In rejecting a procedural default rule in *Thomas*, the Sixth Circuit likewise stated that the goal of the PLRA exhaustion requirement was merely to give prison officials "an opportunity to satisfy those inmate grievances the state wishes to handle internally. . . . [I]f the states forgoes an opportunity to decide matters internally whether for internal time constraints or any other reason, the PLRA has nonetheless served its purpose, and the prisoner may proceed to federal court." 337 F.3d at 726 (citation omitted).

As an initial matter, this "bare opportunity" gloss on the PLRA exhaustion requirement cannot account for core features of the mandate that an inmate "exhaust the grievance procedures offered" at the administrative level. *Booth*, 532 U.S. at 738. For example, caselaw from both the Sixth and

---

7. Often, grievance procedures permit prison officials to accept untimely filings only where the inmate demonstrates "good cause" or something similar. *See, e.g.*, Ohio Admin. Code § 5120-9-31(J)(1)-(2) (requiring "good cause"); 7 N.Y.C.R.R. § 701.7(a)(1) note (requiring "mitigating circumstances"); 28 C.F.R. § 542.14(b) (inmate must "demonstrate[] a valid reason for delay"). Under the Ninth Circuit's reading, however, the PLRA mandates that an inmate who misses an administrative deadline must always file an untimely grievance, even if the inmate concededly cannot make the required showing.

Ninth Circuits requires inmates to pursue all levels of available review provided by the prison grievance system. *See, e.g., Hartsfield v. Vidor*, 199 F.3d 305, 309 (6th Cir. 1999); *Brown v. Valoff*, 422 F.3d 926, 934-35 (9th Cir. 2005). It is not enough, therefore, for an inmate to give prison officials an "opportunity" to address his claim at the initial level of review. Rather, the inmate must fully utilize the prison's grievance procedures. It is anomalous, to say the least, to dismiss the claims of an inmate who filed a timely grievance without pursuing all administrative appeals, but to excuse another inmate's long-untimely filing on the ground that prison officials nevertheless had an opportunity to address the inmate's claim if they wished to do so.

Moreover, the "bare opportunity" theory wrongly conceives of the PLRA's exhaustion requirement principally as a "benefit accorded to state prisons." *Thomas*, 337 F.3d at 726. As explained above, § 1997e(a) was meant to be much more than that. Indeed, its primary objective was to alleviate the crushing burden that prisoner litigation was imposing on the nation's courts. The statute furthers that goal by exploiting the ability of existing prison grievance procedures to provide relief that may satisfy an inmate without litigation, to filter out frivolous claims, and to develop a record that may help to define the contours of any litigation. Again, only administrative grievances that are considered on the merits provide those benefits. *See supra* at 8.

Thus, to conclude that the PLRA's exhaustion requirement has no procedural default component, one must believe that Congress did not aim to strongly encourage inmates to file timely prison grievances, but rather was content to pin the effectiveness of the exhaustion requirement on hopes that prison officials would seize any "opportunity"

to consider grievances on the merits, no matter how and when those grievance were presented. Not only is that view at odds with Congress's clear intent to "invigorate[] the exhaustion prescription" for inmate suits, *Porter*, 534 U.S. at 524, but it "improperly shifts the burden [of the exhaustion requirement] from inmates to prison officials." *Thomas*, 337 F.3d at 742 (Rosen, J., dissenting in part).

Indeed, the Ninth Circuit's rule presents prison officials with the dilemma of either enforcing their administrative time limits or routinely ignoring such limits in order to allow for untimely grievance filings to yield the benefits of meaningful exhaustion. Choosing the latter course would essentially erase the grievance system's deadlines and sacrifice the integrity of the grievance procedures so that federal caseloads can be reduced.

Administrative time limits are critical to the effectiveness of grievance processes as a tool for prison management. No dispute resolution procedure can operate without such deadlines, and strong imperatives of prison management require that the time limits for prison grievance filings and appeals (as well as those for officials' decisions on such filings) be rather short. For example, such deadlines allow the administrative process to capture "the inherent benefit of prompt investigation, while memories are still fresh and all involved inmates and prison employees remain at the facility." *Thomas*, 337 F.3d at 753 (Rosen, J., dissenting in part). Facilitating effective investigation is essential given the huge volume of grievances that prison officials must process and the quotidian nature of many inmate grievances. *See, e.g.*, N.Y. Dep't of Corr. Servs., Inmate Grievance Program Annual Report 2-3 (2004) (showing that inmates in the New York State correctional system filed 44,587

grievances in 2004); *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973) (noting that "most potential litigation involving state prisoners arises on a day-to-day basis").

The administrative deadlines of grievance systems also reflect "the desire to bring the entire matter, including all available internal appeals, to a conclusion within a reasonable time period," *Thomas*, 337 F.3d at 753 (Rosen, J., dissenting in part) — a goal that assumes added importance when an inmate's lawsuit must await the conclusion of the administrative process. *See McCarthy*, 503 U.S. at 147 (recognizing the "prejudice" that "may result . . . from an unreasonable or indefinite timeframe for administrative action" where exhaustion is required). Further, the time limits enable swift remedial action, which minimizes the adverse consequences of any earlier error and is more likely to satisfy the inmate than a delayed response. Finally, the deadlines ensure that correctional officials receive timely feedback about problems before inmate dissatisfaction with institutional policies or the conduct of prison employees festers and leads to unrest or disturbances among the prison population.[8]

It is illogical to suppose that Congress meant for the PLRA exhaustion requirement to interfere with prison officials' enforcement of administrative deadlines and to compromise the effectiveness of prison grievance systems

8. Indeed, New York's prison grievance procedures were developed in 1975 in direct response to the Attica uprising of September 1971. *See Matter of Patterson v. Smith*, 53 N.Y.2d 98, 101 (1981) ("The McKay Commission, appointed to look into the causes of that uprising and make recommendations for change, concluded that a major cause of inmate tension was the lack of a nonviolent means of resolving grievances.").

— particularly when federal legislators emphasized their desire to the contrary. *See*, *e.g.*, 141 Cong. Rec. S14413, S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) ("[I]t is time to . . . return [control of our prisons] to competent administrators"). Yet that assumption is exactly what the Ninth Circuit's holding requires, and accordingly this Court should grant certiorari to reverse it.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

ELIOT SPITZER
Attorney General of the State of New York
CAITLIN J. HALLIGAN*
Solicitor General
ROBERT H. EASTON
Deputy Solicitor General
RICHARD DEARING
Assistant Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8016
Attorneys for Amicus Curiae State of New York

* *Counsel of Record*

TERRY GODDARD
Attorney General
State of Arizona
1275 West Washington
Phoenix, AZ 85007-2926

MIKE BEEBE
Attorney General
State of Arkansas
323 Center Street
Little Rock, AR 72201
(501) 682-3657

JOHN W. SUTHERS
Attorney General
State of Colorado
1525 Sherman Street
7th Floor
Denver, CO 80203

THURBERT E. BAKER
Attorney General
State of Georgia
DEPARTMENT OF LAW
40 Capitol Square Southwest
Atlanta, GA 30334

MARK J. BENNETT
Attorney General
State of Hawaii
425 Queen St.
Honolulu, HI 96813

LAWRENCE G. WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

PHILL KLINE
Attorney General
State of Kansas
120 S.W. 10th Avenue
Topeka, KS 66612-1597

G. STEVEN ROWE
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland
200 St. Paul Place
Baltimore, MD 21202

THOMAS F. REILLY
Attorney General
Commonwealth
of Massachusetts
One Ashburton Place
Boston, MA 02108

MICHAEL A. COX
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

BRIAN SANDOVAL
Attorney General
State of Nevada
100 NORTH CARSON STREET
CARSON CITY, NEVADA 89701

WAYNE STEINHEIM
Attorney General
State of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505-0040

JIM PETRO
Attorney General
State of Ohio
30 E. Broad Street
17th Floor
Columbus, OH 43215

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma
2300 N. Lincoln Boulevard
Suite 112
Oklahoma City,
OK 73105-4894

HARDY MYERS
Attorney General
State of Oregon
1162 Court Street N.E.
Salem, OR 97301

HENRY MCMASTER
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, SC 29211

MARK L. SHURTLEFF
Attorney General
State of Utah
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-2320

WILLIAM H. SORRELL
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609-1001

JUDITH WILLIAMS JAGDMANN
Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219

ROB MCKENNA
Attorney General
State of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100

ROBERT J. SPAGNOLETTI
Attorney General
The District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue NW
Suite 409
Washington DC 20004

No. 05-416

Supreme Court, U.S.
FILED
DEC 29 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JEANNE S. WOODFORD
and ANTHONY P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

BILL LOCKYER
Attorney General of the
State of California
JAMES M. HUMES
Chief Assistant Attorney General
MANUEL M. MADEIROS
State Solicitor General
FRANCES T. GRUNDER
Senior Assistant Attorney General
THOMAS S. PATTERSON
Supervising Deputy
Attorney General
JENNIFER G. PERKELL
Deputy Attorney General
Counsel of Record
State Bar No. 203205
455 Golden Gate Avenue,
Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5726
Fax: (415) 703-5843

Counsel for Petitioners

MEIR FEDER
Counsel of Record
JONES DAY
222 East 41st St.
New York, NY 10024
Telephone: (212) 326-7870
Fax: (212) 755-7306

Counsel for Respondent

Petition For Certiorari Filed September 29, 2005
Certiorari Granted November 14, 2005

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Plaintiff's Complaint, United States District Court for the Northern District of California, San Jose Division, filed July 18, 2001 2

Plaintiff's Opposition to Defendant's Motion to Dismiss, United States District Court for the Northern District of California, San Jose Division, filed February 19, 2003 15

Declaration of Viet Mike Ngo in Support of Plaintiff's Opposition to Motion to Dismiss, United States District Court for the Northern District of California, San Jose Division, filed April 8, 2003 21

Actual Copies of Plaintiff's Two Inmate Appeals (Exhibit A to Declaration of Viet Mike Ngo in Support of Plaintiff's Opposition to Motion to Dismiss) 38

Notice of Appeal, United States District Court for the Northern District Of California, San Jose Division, filed May 29, 2003 43

TABLE OF CONTENTS – Continued

Page

The following Opinion and Orders were printed in the Petition for a Writ of Certiorari and are not reproduced in this Joint Appendix. They can be found at the following pages:

Order Granting Defendants' Motion to Dismiss, United States District Court for the Northern District of California, Filed May 5, 2003 .....App. 22

Opinion, United States Court of Appeals for the Ninth Circuit, Filed March 24, 2005.....App. 1

Order Denying Rehearing, United States Court of Appeals for the Ninth Circuit, Filed July 1, 2005 .....App. 27

RELEVANT DOCKET ENTRIES

United States District Court
For the Northern District of California
San Jose Division

Doc.	Proceeding
1	Plaintiff's complaint, filed July 18, 2001
13	Plaintiff's opposition to motion to dismiss, filed February 19, 2003
14	Declaration of Plaintiff Viet Mike Ngo in support of opposition to motion to dismiss, filed April 8, 2003
15	Order granting Defendants' motion to dismiss, filed May 5, 2003
16	Notice of appeal, filed May 29, 2003

United States Court of Appeals
for the Ninth Circuit

March 24, 2005 – opinion and judgment filed

July 1, 2005 – order denying rehearing filed

COMPLAINT BY A PRISONER UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

Name Ngo Viet M.
(Last) (First) (Middle)

Prisoner Number E-21895

Institutional Address San Quentin State Prison,
San Quentin, CA 94974

==========

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Viet Mike Ngo
(Enter the full name of the plaintiff in this action)

vs.

J.S. Woodford, A.P. Kane; et al.

(Enter the full name of the defendant(s) in this action)

Case No. C 01-20674
(To be provided by the clerk of court)

COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

(Filed Jul. 18, 01)

(XX) DEMAND FOR JURY TRIAL

(___) NO JURY TRIAL DEMAND
(Check one only)

All questions on this complaint form must be answered in order for your action to proceed.

I. Exhaustion of Administrative Remedies

Note: You must exhaust your administrative remedies before your claim can go forward. The court will dismiss any unexhausted claims.

A. Place of present confinement San Quentin State Prison

B. Is there a grievance procedure in this institution?
YES (XX) NO ( )

C. Did you present the facts in your complaint for review through the grievance procedure?
YES (XX) NO ( )

D If your answer is YES, list the appeal number and the date and result of the appeal at each level of review. If you did not pursue a certain level of appeal, explain why.

1. Informal appeal Two appeals submitted, San Quentin Appeals Office refused to process claiming time constraints for filing not being met. However, my rights are still being denied on an ongoing basis.

2. First formal level See above.

3. Second formal level See above.

4. Third formal level See above.

E. Is the last level to which you appealed the highest level of appeal available to you?
YES (XX) NO ( )

F. If you did not present your claim for review through the grievance procedure, explain why. N/A

CLAIM I

II. Parties

Write your name and your present address. Do the same for additional plaintiffs, if any.

A. Viet Mike Ngo, San Quentin State Prison, San Quentin, CA 94974

Write the full name of each defendant, his or her official position, and his or her place of employment.

B. J.S. Woodford, Warden; A.P. Kane, Chief Deputy Warden; J. Rubia, Correctional Captain; H. Hammond, Correctional Counselor II; B.J. Carlile, Correctional Lieutenant; I.A. Nienhuis, Correctional Lieutenant. All defendants are members of the Unit Classification Committee, except the Warden, who is their superior. San Quentin State Prison, San Quentin, CA 94974.

CLAIM I

III. Statement of Claim

State here as briefly as possible the facts of your case. Be sure to describe how each defendant is involved and to include dates, when possible. Do not give any legal arguments or cite any cases or statutes. If you have more than one claim, each claim should be set forth in a separate numbered paragraph.

I am a 31 year-old Vietnamese American serving a life term (Second Degree) for murder. I have been a life long practicing Catholic.

I have been restricted and have had obstacles placed in the practice of my faith, Catholicism, by Mr. A.P. Kane, Chief Deputy Superintendent at San Quentin Prison.

Specifically, on October 26, 2000, I was placed in Administrative Segregation for "inappropriate activity." I was not issued a disciplinary report and was never found guilty of any Rules violation.

I was released to the mainline on 12-23-00 but was explicitly restricted by Mr. Kane from participating in any "special programs" at a classification committee the day

before, 12-22-00. Special programs at San Quentin include evening fellowship and study sessions including:

a. Centering Prayer

b. Teachings of the Catholic Church

c. Meditation/prayer sessions

d. Holy Week Services including Stations of the Cross and Foot-washing

e. Catechism classes

f. Vietnamese language Bible study

g. Choir practice

h. Seasonal worship

i. Personal Counseling

j. Confession

k. Monthly Taize/prayer/meditation service

l. Kairos

I regularly participated in these and other Catholic Church programs before Mr. Kane restricted me from all Catholic Church activities except for Sunday Mass.

I was barred from attending Holy Week Services which included critical observances of the Catholic faith – foot-washing and Stations of the Cross.

I have been prohibited from attending Vietnamese language Bible study and participating in fellowship with Vietnamese monks and nuns. I can not* attend Taize and Kairos prayer and fellowship services and other worship services integral to the Catholic faith.

---

* Any typographical and/or incorrect punctuation found in the following Joint Appendix pages was intentionally left to show accurately how the original documents appeared.

The investigation of the alleged "inappropriate activity" for which I had been placed in segregation was conducted by Lieutenant B. Carlile. Lt. Carlile wrote that the allegations "could not be confirmed or established in this investigation." Yet I am being denied the right to participate in the practice and worship that my faith requires. The exclusion placed on me by Mr. Kane applies to a wide variety of programs and is a severe impediment to my religious freedom. The restrictions are not legitimately related to any bona fide security issue or any wrongdoing on my part. I emphasize that I was never charged nor found guilty of any violation that would justify these restrictions on my religious freedom.

CLAIM II

D. If your answer is YES, list the appeal number and the date and result of the appeal at each level of review. If you did not pursue a certain level of appeal, explain why.

1. Informal appeal Two appeals submitted. San Quentin Appeals Office refused to process claiming time constraints for filing not being met. However, my rights are still being denied on an ongoing basis.

2. First formal level See above.

3. Second formal level See above.

4. Third formal level See above.

E. Is the last level to which you appealed the highest level of appeal available to you?
YES (XX) NO ( )

F. If you did not present your claim for review through the grievance procedure, explain why.
N/A

CLAIM II

II. Parties

Write your name and your present address. Do the same for additional plaintiffs, if any.

A. Viet Mike Ngo, San Quentin State Prison, San Quentin, CA 94974

Write the full name of each defendant, his or her official position, and his or her place of employment.

B. J.S. Woodford, Warden; A.P. Kane, Chief Deputy Warden; J. Rubia, Correctional Captain; H. Hammond, Correctional Counselor II; B.J. Carlile, Correctional Lieutenant; I.A. Nienhuis, Correctional Lieutenant. All defendants are members of the Unit Classification Committee, except the Warden, who is their superior. San Quentin State Prison, San Quentin, CA 94974.

III. Statement of the Claim

State here as briefly as possible the facts of your case. Be sure to describe how each defendant is involved and to include dates, when possible. Do not give any legal arguments or cite any cases or statutes. If you have more than one claim, each claim should be set forth in a separate numbered paragraph.

My right to free speech and expression has been violated by Mr. A.P. Kane, Chief Deputy Superintendent at San Quentin Prison. Specifically, my right to correspond with, visit with, and telephone Kourtney Hallum, a former volunteer in the San Quentin Catholic Chapel, have been denied by Mr. Kane who has threatened me with transfer if I write, call, or receive visits from her. The California Code of Regulations (Title 15) Section 3020, specifically states that: "Inmate

participation in an approved activity group will not be cause to deny or restrict regular correspondence and visitation with persons who are approved to attend and participate in such inmate group activities."

On 12/22/00, I was threatened at my monthly Administrative Segregation committee hearing by CCII H. Hammond and Correctional Captain J. Rubia, not to call or write Miss Hallum. Mr. Kane was present and chaired this committee. On 12/22/00, Mr. Kane told me my writing to Miss. Hallum "violates security and safety of the institution." Mr. Kane also threatened to transfer me if I attended any evening activities that had outside volunteers such as college classes, Alternatives to Violence, SQUIRES, or Church with the exception of Sunday Mass. Miss Hallum was never charged with wrongdoing while a volunteer at San Quentin and I never was issued a Rules Violation Report or found guilty of any wrongdoing that would justify the restrictions imposed on me. My right to freely communicate and express ideas and opinions has been denied by Mr. Kane.

CLAIM III

D. If your answer is YES, list the appeal number and the date and result of the appeal at each level of review. If you did not pursue a certain level of appeal, explain why.

1. Informal appeal Two appeals submitted. San Quentin Appeals Office refused to process claiming time constraints for filing not being met. However, my rights are still being denied on an ongoing basis.

2. First formal level See above.

3. Second formal level See above.

4. Third formal level See above.

E. Is the last level to which you appealed the highest level of appeal available to you?
YES (XX) NO ( )

F. If you did not present your claim for review through the grievance procedure, explain why. N/A

CLAIM III

II. Parties

Write your name and your present address. Do the same for additional plaintiffs, if any.

A. Viet Mike Ngo, San Quentin State Prison, San Quentin, CA 94974

Write the full name of each defendant, his or her official position, and his or her place of employment.

B. J.S. Woodford, Warden; A.P. Kane, Chief Deputy Warden; J. Rubia, Correctional Captain; H. Hammond, Correctional Counselor II; B.J. Carlile, Correctional Lieutenant; I.A. Nienhuis, Correctional Lieutenant. All defendants are members of the Unit Classification Committee, except the Warden, who is their superior. San Quentin State Prison, San Quentin, CA 94974.

III. Statement of Claim

State here as briefly as possible the facts of your case. Be sure to describe how each defendant is involved and to include dates, when possible. Do not give any legal arguments or cite any cases or statutes. If you have more than one claim, each claim should be set forth in a separate numbered paragraph.

My right and expectation of parole has been violated and abridged by Mr. A.P. Kane, Chief Deputy Superintendent at San Quentin Prison, who has denied me the right to participate in "Special Programs" at San Quentin Prison. "Special Programs" includes college courses, self-help groups including Alternatives to Violence and other religious, educational, musical and volunteer groups that the Board of Prison Terms recommends and often requires of lifers so that they can be found suitable for parole.

My inability to participate in these and other programs upon threat of transfer means I can not upgrade myself educationally or obtain the experiences and documentation that would enable me to be found suitable for parole.

My liberty interest in parole has been denied by Mr. Kane.

I have been denied the same rights other lifers have to participate in programs so that they can receive parole dates. This right has been taken from me without due process or any wrongdoing on my part.

CLAIM IV

D. If your answer is YES, list the appeal number and the date and result of the appeal at each level of review. If you did not pursue a certain level of appeal, explain why.

1. Informal appeal Two appeals submitted. San Quentin Appeals Office refused to process claiming time constraints for filing not being met. However, my rights are still being denied on an ongoing basis.

2. First formal level See above.

3. Second formal level See above.

4. Third formal level See above.

E. Is the last level to which you appealed the highest level of appeal available to you?
YES (XX) NO ( )

F. If you did not present your claim for review through the grievance procedure, explain why. N/A

CLAIM IV

II. Parties

Write your name and your present address. Do the same for additional plaintiffs, if any.

A. Viet Mike Ngo, San Quentin State Prison, San Quentin, CA 94974

Write the full name of each defendant, his or her official position, and his or her place of employment.

B. J.S. Woodford, Warden; A.P. Kane, Chief Deputy Warden; J. Rubia, Correctional Captain; H. Hammond, Correctional Counselor II; B.J. Carlile, Correctional Lieutenant; I.A. Nienhuis, Correctional Lieutenant. All defendants are members of the Unit Classification Committee, except the Warden, who is their superior. San Quentin State Prison, San Quentin, CA 94974.

III. Statement of Claim

State here as briefly as possible the facts of your case. Be sure to describe how each defendant is involved and to include dates, when possible. Do not give any legal arguments or cite any cases or statutes. If you have more than

one claim, each claim should be set forth in a separate numbered paragraph.

I have been defamed and had my right to privacy violated by A.P. Kane, Chief Deputy Superintendent at San Quentin Prison, and by B.J. Carlile, Correctional Lieutenant at San Quentin Prison. Mr. Kane and Lt. Carlile acted both unreasonably and in violation of state law in publicizing an uncorroborated and unsubstantiated allegation that I had "engaged in sexual relationships with Catholic volunteer priests."

The shocking and scurrilous nature of this charge has damaged me emotionally and hurt my reputation. This charge was improperly disclosed to other inmates in a memorandum and to free volunteers who come to the prison. It was improperly publicized in violation of state confidentiality laws to my detriment. The allegation was based on confidential sources whose reliability was not tested, not established according to procedures set forth in state law. The charge was publicized in violation of State Law confidentiality rules.

IV. Relief

Your complaint cannot go forward unless you request specific relief. State briefly exactly what you want the court to do for you. Make no legal arguments; cite no cases or statutes.

1.) An order restraining A.P. Kane and San Quentin from denying me the right to participate in special programs, including evening religious, educational, musical, and self-help programs.

2.) An order restraining A.P. Kane and San Quentin from denying me the right to correspond, visit, or phone Miss K. Hallum.

3.) Removal from my central file of all reports relating to the unproved allegations of sexual misconduct and over-familiarity with volunteers.

4.) Compensatory and punitive damages in an amount to be determined at trial for defamation, denial of my religious rights, First Amendment rights, and liberty interest in parole.

5.) An order restraining A.P. Kane and San Quentin from retaliating transfer or other actions against me.

6.) Further equitable relief as the court deems proper.

7.) Appointment of counsel, especially to represent my claim of denial of religious freedom.

DATED: 7-11-01 /s/ Viet M. Ngo
(Plaintiff's signature)

VERIFICATION
(optional)

I am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true. I declare under penalty of perjury that the foregoing is true and correct.

DATED: 7-11-01 /s/ Viet M. Ngo
(Plaintiff's signature)

JURY TRIAL DEMAND
(optional)

I demand a jury trial for all claims for which a jury trial is allowed.

YES (X) NO ( ) (check one only)

DATED: 7-11-01

/s/ Viet M. Ngo
(Plaintiff's signature)

VIET MIKE NGO
E-21895
Avenal State Prison
P.O. BOX 8
Avenal, CA. 93204
In Pro Per

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CASE NO. C 01-20674 JF

VIET M. NGO,

Plaintiff,

v.

J.S. WOODFORD
A. P. KANE,

Defendants.

PLAINTIFF'S MOTION IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULE 12(b) AND 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

(Filed Feb. 19, 2003)

TO: J.S. WOODFORD, ET. AL., DEFEDNDANTS

PLEASE TAKE NOTICE that Plaintiff Viet Mike Ngo hereby moves this Court for an order allowing this action to proceed on the grounds that Plaintiff has exhausted his available administrative remedies; has established supervisory liability under ß1983 and has stated a claim against each of the defendants.

This motion is based upon this motion, the points and authorities cited in support thereof, the declaration attached hereto and the Court's file in this action.

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Defendants urge dismissal of the complaint because plaintiff has failed to exhaust his administrative remedies.

Plaintiff notes that defendants have not proved that plaintiff failed to exhaust his administrative remedies.

There are disputed issues of fact regarding efforts plaintiff has made to exhaust his claims.

Defednants cite the language in **BOOTH v Churner 532 US 731, 121 S. Ct. 1819, 149 L. Ed. 2d. 958 (2001)** and urge that the exhaustion requirement contained in the PLRA is mandatory.

In Brady v. Attygala 196 F. Supp 2d 1016, 1020 (C.D. CA 2002) the Court discussed the exhaustion requirement in Booth.

"In the course of reaching its conclusion the court noted that it would "not read futility or other exceptions" into section 1997e(a)'s exhaustion requirement. Id., at 182 n.6. The court went on to hold that "an inmate must exhaust irrespective of the form of relief sought and offered through administrative avenues." Id. It is these statements in the Court's opinion that defendants argue require an inmate to continue to appeal his grievance even after winning at a lower level in the administrative process. The problem is that these statements say nothing about **when** an inmate is considered to have actually exhausted his administrative remedies.

Instead, these statements merely indicate that an inmate must exhaust his remedies regardless of the relief he seeks or the relief offered by the prison grievance system. See id.

1823 (explaining that the phrase "such administrative remedies as are available" requires an inmate to exhaust whatever grievance procedures are available, "whether or not the possible responses cover the specific relief the prisoner demands" in his federal complaint). One must look to another section of the Court's opinion for an answer to the question **when** an inmate is considered to have exhausted his remedies:

The Court noted at the outset of its opinion that its analysis was premised upon the assumption "that some redress for a wrong is presupposed by the statute's requirement of an 'available" 'remedy.'" Id. at 1822. So long as there exists a "possibility of some relief for the action complained of," an available remedy still exists for the inmate to exhaust. Id. 1824. To the Court it is the possibility of relief that is critical in determining **when** an inmate has exhausted his administrative remedies. "Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust." Id. at 1822 n. 4. Further pursuit of an administrative appeal is therefore not required when no relief whatsoever is available for the inmate to obtain through the prison administrative process. At that point, the inmate has "nothing °leftN to exhaust." Id."

Although **BRADY** dealt with an administrative appeal that had been granted but not exhausted, the holding applies to the instant case.

Here petitioner submitted administrative appeals on each of the issues that is the subject of his federal claims.

The San Quentin Appeals Coordinator refused to process the appeals and screened the out.

The Appeals Coordinator will not accept appeals of screening decisions.

It is impossible to submit an appeal to the **next** level when the appeal is rejected for processing at the first instance.

Petitioner is now on out to court status in administrative segregation in San Quentin's Carson Unit. His legal property is stored in the Avenal State Prison Law Library. (See Declaration of Plaintiff Viet Mike Ngo)

Plaintiff asks this Court for 50 days from his return to Avenal State Prison to submit documentary evidence of his efforts to submit administrative appeals on the issued raised in his complaint and to show how they were rejected for processing.

There are no more levels of review available under the administrative processing of appeals at San Quentin once an appeal is rejected for processing at the First Level.

Plaintiff was denied his rights under Title 15 ß3084.1 Right to Appeal. Now Defendants raise this as grounds to dismiss his Complaint.

Defendants acknowledge that "ß1997e(a) creates a defense – defendants have the burden of raising and proving exhaustion."

WYATT v. HUBBARD 2003 DJDAR 106, 109

Plaintiff submitted two appeals on each of the claims raised in his complaint. The Appeals Coordinator refused to prcoess those appeals claiming time constraints were not me. However, the denial of my right to attend religious services was an ongoing violation and my appeal was filed while my rights were being violated.

Similarly, my appeals on the other claims were filed while those rights were being violated. My appeals were rejected.

B PLAINTIFF HAS STATED A CLAIM AGAINST DEFENDANT WOODFORD

Federal Rule of Civil Procedure 8(f) requires that all pleading shall be construed to do substantial justice.

Federal Rule of Civil Procedure 15(a) states that leave to amend pleadings shall be freely given when justice so requires.

Plaintiff requests leave to amend his complaint to include an allegation that Warden Woodford had direct knowledge through reports and conversations of the actions taken to restrict plaintiff's religious freedom and First Amendment Rights and approved and acquiesced in those actions.

C. PLAINTIFF'S CLAIMS FOR INJUNCTIVE RELIEF ARE NOT MOOT

Plaintiff claims that he was transferred from San Quentin in retaliation for the lawful exercise of his First Amendment Rights and for bringing this action and an active writ in Marin County Superior Court charging San Quentin Warden with practicing illegal racial segregation in housing and discipline.

Plaintiff is **now** in San Quentin and will seek a Court order for his return to San Quentin. Accordingly injucntive relief is not moot since it is likely that Plaintiff will return to San Quentin.

D. PLAINTIFF ASKS FOR AN ORDER THAT NAMED DEFEDNANTS WHO CLAIMED THEY WERE UNSERVED WAIVE OF SERRVICE AND SUMMONS

Plaintiff alleges that all named defednants to this lawsuit were served. Due to his current placement in Ad Seg, plaintiff cannot contact the individuals who arranged for service of the summons and complaint.

Nonetheless, plaintiff asks counsel for defendants for a request for waiver of service of the summons to save the costs of service of summons and an additional copy of the complaint in this lawsuit.

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in sacing unnecessary costs of service of the summons and complaint.

Plaintiff is incarcerated and proceeding in pro per and asks this Court for an order waiving service of the summons and complaint on the other defendants named in his complaint.

CONCLUSION

Plaintiff respectfully asks this Court to allow this action to proceed and to allow leave to file an amended complaint with allegations supporting defendant Woodford's liability. Plaintiff also asks for an order granting him 50 days from the date of his return to Avenal State prison in which

to file supporting documentary evidence of his efforts to exhaust the claims presented in this suit.

Respectfully Submitted Date: 2/12/03
/s/ V. M. Ngo
VIET MIKE NGO
In Pro Per

DECLARATION OF VIET MIKE NGO

I, VIET MIKE NGO DECLARE AS FOLLOWS:

1. I am the plaintiff in this matter.

2. I am housed at Avenal State Prison but was transferred back to San Quentin Prison on February 4, 2003 for a Court appearance in Marin County Superior Court n a petition for writ of Habeas before Judge V. Adams.

3. I do not know the date when I will be returned to Avenal State Prison.

4. My legal property including materials relating to this action are stored at the Avenal State Prison Law Library.

5. I made two efforts to exhaust each of the claims presented in this action.

6. A process server was hired to serve each of the named defendants in this action with a summons and complaint.

6. I am now housed in administrative segregation, Carson Section at San Quentin and cannot obtain verification that all defendants were served.

7. When I am returned to Avenal State Prison I will again be on orientation status with no immediate access to the law library. Accordingly I request 50 days from the

date of my return in which to retrieve and asseemble documentary support that I exhausted available administrative remedies.

8. The request is not made to delay prosecution of this action or for any improper motive.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of February, 2003 at San Quentin, CA, County of Marin.

/s/ V. M. Ngo
VIET MIKE NGO
In Pro Per

[Declaration Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

VIET MIKE NGO, Plaintiff, v. J.S. WOODFORD, et al., Defendants.	)	CASE NO. C 01-20674 (JF)

DECLARATION OF VIET MIKE NGO

(Filed Apr. 8, 2003)

I, Viet Mike Ngo, declare as follows:

1. I am the plaintiff in this matter: case # C 01-20674

2. I filed a motion in opposition to defendants' motion to dismiss on 2-19-03 where I notified the court that I would be filing supporting documentary evidence to show that I exhausted the claims presented in this suit. I also requested 50 days to accomplish this after returning to Avenal State Prison.

3. Attached as exhibit A to this declaration are copies of my rejected 602s from the Appeals Office of San Quentin State Prison regarding the claims presented in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

and that this declaration was executed on April 3, 2003, at Avenal State Prison.

/s/ V. M. Ngo
Viet Mike Ngo
In Pro Per

EXHIBIT A

INMATE/PAROLEE APPEALS SCREENING FORM

Name Ngo Number E21895 SQP/LOG No._____
(Other Log No) _____ Issue: _____ Area of Origin: _____
Housing Unit _____ Note _____

YOUR APPEAL IS BEING RETURNED TO YOU FOR THE FOLLOWING REASON(S):

___ 1. The action or decision being appealed is not within the jurisdiction of the Department.
- ___ a. **BPT Issue**, file **BPT 1040 form** & submit to **C&PR**
- ___ b. Other, see comments

___ 2. You have submitted a duplicate appeal on the same issue. Check one:
- ___ Your first appeal was screened out on _____ for _____
- ___ Your appeal is currently under review at the _____ level.
- ___ Your first appeal has been completed at the _____ level.

___ 3. You are appealing an action not yet taken.

___ 4. You may not submit an appeal on behalf of another inmate.

___ 5. You have not adequately completed the Inmate/ Parolee Form (CDC 602) or attached the proper documents.

___ CDC-115 Hearing Officer's or Disciplinary Committee Results.
___ CDC-115A with I.E./D.A. info.
___ CDC-128G ICC/UCC Clas. Com.
___ Lab Results Sheet
___ CDC-7219 Medical Report
___ Board of Control Claim Form (attached)
___ Receipts: ___ Qtr. Pkg. Inventory Slip
___ You have failed to complete Section ___
___ CDC-128B1 Hearing Notif.
___ CDC-128G Init. Clas. Com.
___ CDC-114D Lock Up Order
___ Legal Status Summary
___ CDC-143 Property Transfer Slip
___ Supplemental Reports to CDC-115.
___ CDC-839/840 Class/Reclass Score Sheet
___ CDC-128G CSR Endorsement Chrono
___ CDC-1030 Confidential Disclosure
___ CDC-128C Medical Chrono
___ Property Inventory Slip
___ Cell Search Slip
___ Sign & Date Section _____
___ Other: _____

X 6. There has been too great a time lapse between when the action or decision occurred and when you filed your appeal.

___ 7. This issue has been appealed under the assigned SQP Appeal Log No. _____. Per DOM section 54100.10.1, a copy of the reviewer's response:
___ Is attached
___ Will be forwarded to you upon completion

___ 8. Abuse of the Appeal Procedure. See Comments.

Comments: Pursuant to CCR 3084.6(c) your appeal is rejected. Issues transpired last year 10-26-00 & 12-23-00

/s/ Chandler-Dacanay /s/ A.A. Read CCII Date Jun 19 2001

R. Chandler-Dacanay
CC-II, Appeals Coordinator

A.A. Read
CC-II, Appeals Coordinator

This screening action may not be appealed unless you allege that the above reason is inaccurate. In such case, please return this form to the Appeals Coordinator with the necessary information.

PERMANENT APPEAL
ATTACHEMENT - DO NOT REMOVE

State of California **Department of Corrections**

Inmate/Parolee
Appeal Form
CDC 602 (12/87)

Location:

Institution/Parole Region	**Log No.**	**Category**
1. _____	1. _____	_____
2. _____	2. _____	

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may

send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

Name	Number	Assignment	Unit/Room Number
NGO, Viet	E-21895	Badger Section Clerk	5N77L

A. Describe Problem: On 10/26/00, I was placed in Administrative Segregation on an allegation of engaging in "inappropriate activity." On 12/23/00 I was released from Ad Seg. I was never served with a Rules Violation Report or presented with any specific charge of wrong doing so I could defend myself against the charge. On 12/23/00 I was threatened by CCII Hammond and Corr. Captain Rubia not to call or write to Ms. Hallum, a volunteer in the Catholic Chapel.

[If you need more space, attach one additional sheet.]

On 12/23/00. A.P. Kane told me that my writing to Ms. Hallum "violates security and trust." Mr. Kane threatened me with immediate transfer if I wrote or called Ms. Hallum. Mr. Kane also threatened to transfer me if I attended any evening activities like education, Alternatives to Violence, and church. Mr. Kane stated I could not have a personal relationship with a volunteer.

My rights under CCR 3020 were violated in that I am being prohibited from corresponding or visiting with a "person approved to attend and participate in such inmate group activities."

My rights to Due Process under CCR 3336 were violated because I was not informed of a specific charge or reason for being placed in Ad Seg. I was not afforded a staff assistant to assist me even though I could not defend the vague and unspecific charge of "inappropriate activity on my own.

I am being denied privileges without any finding of wrongdoing and being denied the right by Mr. Kane to attend evening education, self-help, music and chapel programs.

In violation of CCR3321 I was not given any confidential source disclosure forms or material in compliance with CCR 3321(b)(3).

B. Action Requested:

1. I want a copy of all restrictions placed on my participation in programs here at San Quentin.

2. I want all restrictions on my participation in programming placed on me by Mr. Kane or anyone under his authority to be removed.

3. I want all mail, phone, visiting restrictions with Ms. Hallum removed.

4. Per CC II Hammond my mail is being "flagged". I request written notice that this practice has ceased.

5. I want return of my seized correspondence and addressbook so I can exercise my right to correspond and phone family and friends.

6. I want a copy of any and all findings or results or investigations of myself relating to my placement in Ad Seg.

7. I want removal of any adverse chronos, reports, memoranda placed in my Central file relating to my placement in Ad Seg.

Inmate/Parolee Signature: /s/ V. M. Ngo

Date Submitted: 6/18/01

C. Informal Level (Date Received: _____)

Staff Response: _____

_____

_____

_____

Staff Signature: _____ Date Returned to Inmate: _____

D. Formal Level

If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response. _____

_____

_____

_____

_____

Signature: _____ Date Submitted: _____

Note: Property/Funds appeals must be accompanied by a completed Board of Control form BC-1E, Inmate Claim

CDC Appeal Number:

_____

3-20-01

To: Mr. A. P. Kane
Chief Deputy Superintendent
San Quentin State Prison

From: Viet Mike Ngo
E-21895
5-N-77L

Because you warned me not to do any special programs and I was told not to write or call Miss Hallum and you will check up on me – I ask to play baseball on the San Quentin team. Thank you. Since my reclassification on 12/23 to A1 status, am I now entitled to participate in any and all special programs?

State of California
Department of Corrections

MEMORANDUM

Date: April 13, 2001

To: Inmate Ngo E-21895

From: **Department of Corrections, California State Prison, San Quentin, CA 94964**

Subject: **RECREATIONAL PROGRAMS**

I have received your letter expressing your desire to participate in the programs we offer here at San Quentin. You may participate in any recreational programs.

I have authorized I. Nienhuis, Community Resources Manager, to review your request to participate in any other program.

If you should have any questions or require additional information, you may direct your questions Mr. I Nienhuis, Community Resource Manager.

/s/ A.P. Kane
A. P. Kane
Chief Deputy Warden

INMATE/PAROLEE APPEALS SCREENING FORM

Name Ngo Number E21895 SQP/LOG No.: _____

(Other Log No) _____ Issue _____ Area of Origin: _____

Housing Unit 5 N 77L Note _____

YOUR APPEAL IS BEING RETURNED TO YOU FOR THE FOLLOWING REASON(S):

___ 1. The action or decision being appealed is not within the jurisdiction of the Department.
   a. **BPT Issue**, file **BPT 1040 form** & submit to **C&PR**
   ___
   ___ b. Other, see comments

___ 2. You have submitted a duplicate appeal on the same issue. Check one:
   ___ Your first appeal was screened out on _____ for _____
   ___ Your appeal is currently under review at the _____ level.
   ___ Your first appeal has been completed at the _____ level.

___ 3. You are appealing an action not yet taken.

___ 4. You may not submit an appeal on behalf of another inmate.

___ 5. You have not adequately completed the Inmate/Parolee Form (CDC 602) or attached the proper documents.

- ___ CDC-115 Hearing Officer's or Disciplinary Committee Results.
- ___ CDC-115A with I.E./D.A. info.
- ___ CDC-128G ICC/UCC Clas. Com.
- ___ Lab Results Sheet
- ___ CDC-7219 Medical Report
- ___ Board of Control Claim Form (attached)
- ___ Receipts: ___ Qtr. Pkg. Inventory Slip
- ___ You have failed to complete Section ___
- ___ CDC-128B1 Hearing Notif.
- ___ CDC-128G Init. Clas. Com.
- ___ CDC-114D Lock Up Order
- ___ Legal Status Summary
- ___ CDC-143 Property Transfer Slip
- ___ Supplemental Reports to CDC-115
- ___ CDC-839/840 Class/Reclass Score Sheet
- ___ CDC-128G CSR Endorsement Chrono
- ___ CDC-1030 Confidential Disclosure
- ___ CDC-128C Medical Chrono
- ___ Property Inventory Slip
- ___ Cell Search Slip
- ___ Sign & Date Section _____
- ___ Other: _____

___ 6. There has been too great a time lapse between when the action or decision occurred and when you filed your appeal.

___ 7. This issue has been appealed under the assigned SQP Appeal Log No. _____. Per DOM section 54100.10.1, a copy of the reviewer's response:

___ Is attached
___ Will be forwarded to you upon completion

___ 8. Abuse of the Appeal Procedure. See Comments.

Comments: Although the exclusion from special programs is on going it started back in 2000 and you waited 6 months before addressing this issue. Per CCR 3084.6(c) your appeal is rejected.

/s/ Chandler-Dacanay /s/ A.A. Read CCII Date Jun 26 2001
R. Chandler-Dacanay A.A. Read
CC-II, Appeals Coordinator CC-II, Appeals Coordinator

This screening action may not be appealed unless you allege that the above reason is inaccurate. In such case, please return this form to the Appeals Coordinator with the necessary information.

PERMANENT APPEAL
ATTACHEMENT - DO NOT REMOVE

State of California **Department of Corrections**

Inmate/Parolee
Appeal Form
CDC 602 (12/87)

Location: Institution/ Parole Region	**Log No.**	**Category**
1. _____	1. _____	_____
2. _____	2. _____	

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and

classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

Name	Number	Assignment	Unit/Room Number
NGO	E-21895	Clerk	5-N-77L

A. Describe Problem: This appeal is brought pursuant to CCR 3084.1 (Right to Appeal) which gives me the right to "appeal any departmental decision, action, condition, or policy . . ." having an adverse effect upon (my) welfare." The attached appeal concerning my exclusion from special programs and other related issues was rejected as not being timely. My exclusion from special programs is an ongoing action and as such, 3084.6 appeal time limit, does not apply. I can't attend 6:20 movement today or tomorrow – so my appeal is timely.

[If you need more space, attach one additional sheet.]

Further, I attempted informal resolution of this issue by writing to Mr. A.P. Kane on 3-20-01 – see attached. His response indicates the issue is still open and now I am exercising my right to appeal.

B. Action Requested:

1. Processing of my appeal.

2. A statement indicating my appeal will not be processed (if you still choose to reject my appeal) and my administrative remedies are exhausted.

Inmate/Parolee Signature: /s/ V. M. Ngo

Date Submitted: 6/25/01

C. Informal Level (Date Received: _____)

Staff Response: _____

_____

_____

_____

Staff Signature: _____ Date Returned to Inmate: _____

D. Formal Level

If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response. _____

_____

_____

_____

_____

Signature: _____ Date Submitted: _____

Note: Property/Funds appeals must be accompanied by a completed Board of Control form BC-1E, Inmate Claim

CDC Appeal Number:

First Level ☐ Granted ☐ P. Granted ☐ Denied
☐ Other _____

E. Reviewer's Action (Complete within 15 working days):
Date assigned: _____ Due Date: _____

Interviewed by: _____

_____

_____

_____

_____

_____

_____

Staff Signature: _____ Title: _____ Date Completed: _____

Division Head Approved:
Signature: _____

Returned
Date to Inmate: _____

F. If dissatisfied, explain reasons for requesting a Second-Level Review, and submit to Institution or Parole Region Appeals Coordinator within 15 days of receipt of response.

_____

_____

_____

_____

Signature: _____ Date Submitted: _____

Second Level ☐ Granted ☐ P. Granted ☐ Denied
☐ Other _____

G. Reviewer's Action (Complete within 10 working days):
Date assigned: _____ Due Date: _____

☐ See Attached Letter

Signature: _____ Date Completed: _____
Warden/Superintendent Date Returned
Signature: _____ to Inmate _____

H. If dissatisfied, add data or reasons for requesting a Director's Level Review, and submit by mail to the third level within 15 days of receipt of response.

_____

_____

_____

_____

_____

_____

Signature: _____ Date Submitted: _____

For the Director's Review, submit all documents to:

Director of Corrections
P.O. Box 942883
Sacramento, CA 94283-0001
Attn: Chief, Inmate Appeals

Director's Action: ☐ Granted ☐ P. Granted
☐ Denied ☐ Other _____

☐ See Attached Letter

Date: _____

[Declaration Of Service Omitted In Printing]

STATE OF CALIFORNIA

INMATE/PAROLEE APPEAL FORM

CDC 602 (12/87)

DEPARTMENT OF CORRECTIONS

Location: Institution/Parole Region | Log No. | Category

1. _____ 1. _____

2. _____ 2. _____

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

NAME	NUMBER	ASSIGNMENT	UNIT/ROOM NUMBER
NGO, Viet	E-21895	Badger Section Clerk	5W77

A. Describe Problem:

On 10/26/00 ,I was placed in Administrative Segregation on an allegation of engaging in "inappropriate activity." On 12/21/00 I was released from Ad Seg. I was never served with a Rules Violation Report or presented with any specific charge of wrong doing so I could defend myself against the charge. On 12/21/00 I was threatened by CCII Hammond and Corr. Captain Rubia not to call or write to Ms. Hallum, a volunteer in the Catholic Chapel.

CONTINUED ON ATTACHED PAGE

If you need more space, attach one additional sheet.

B. Action Requested:

SEE ATTACHED

Inmate/Parolee Signature: _____ Date Submitted: JUN 18 2001 6/18/01

C. INFORMAL LEVEL (Date Received: _____)

Staff Response:

Staff Signature: _____ Date Returned to Inmate: _____

D. FORMAL LEVEL

If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response.

Signature: _____ Date Submitted: _____

Note: Property/Funds appeals must be accompanied by a completed Board of Control form BC-1E, Inmate Claim

CDC Appeal Number:

6 19 #4

BEST AVAILABLE COPY

CONTINUATION OF INMATE APPEAL/NGO,Viet E-21895

On 12/23/00. A.P. Kane told me that my writing to Ms. Hallum "violates security and trust." Mr. Kane threatened me with immediate transfer if I wrote or called Ms. Hallum.
Mr. Kane also threatened to transfer me if I attended any evening activities like education, Alternatives to Violence, and church. Mr. Kane stated I could not have a personal relationship with a volunteer.

My rights under CCR 3020 were violated in that I am being prohibited from corresponding or visiting with a "person approved to attend and participate in such inmate group activities."

My rights to Due Process under CCR 3336 were violated because I was not informed of a specific charge or reason for being placed in Ad Seg. I was not afforded a staff assistant to assist me even though I could not defend the vague and unspecific charge of "inappropriate activity on my own.

I am being denied privileges without any finding of wrongdoing and being denied the right by Mr. Kane to attend evening education, self-help, music and chapel programs.

In violation of CCR3321 I was not given any confidential source disclosure forms or material in compliance with CCR 3321(b)(3).

ACTION REQUESTED:
1. I want a copy of all restrictions placed on my participation in programs here at San Quentin.

2. I want all restrictions on my participation in programming placed on me by Mr. Kane or anyone under his authority to be removed.

3. I want all mail, phone, visiting restrictions with Ms. Hallum removed.
4. Per CC II Hammond my mail is being "flagged". I request written notice that this practice has ceased.

5. I want return of my seized correspondence and addressbook so I can exercise my right to correspond and phone family and friends.

6. I want a copy of any and all findings or results or investigations of myself relating to my placement in Ad Seg.

7. I want removal of any adverse chronos, reports, memoranda placed in my Central file relating to my placement in Ad Seg.

6/18/01

STATE OF CALIFORNIA

DEPARTMENT OF CORRECTIONS

INMATE/PAROLEE APPEAL FORM

CDC 602 (12/87)

Location: Institution/Parole Region: 1. _____ 2. _____

Log No.: 1. _____ 2. _____

Category: _____

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

NAME	NUMBER	ASSIGNMENT	UNIT/ROOM NUMBER
Ngo	E-21895	Clerk	5-N-77L

A. Describe Problem: This appeal is brought pursuant to CCR 3084.1 (Right to Appeal) which gives me the right to "appeal any departmental decision, action, condition, or policy..." having an adverse effect upon (my) welfare." The attached appeal concerning my exclusion from special programs and other related issues was rejected as not being timely. My exclusion from special programs is an ongoing action and as such, 3084.6 appeal time limit, does not apply. I can't attend 6:20 movement today or tomorrow--so my appeal is timely.

See attached.

If you need more space, attach one additional sheet.

B. Action Requested: See attached.

Inmate/Parolee Signature: _____ Date Submitted: 6/25/01

JUN 25 2001

C. INFORMAL LEVEL (Date Received: _____)

Staff Response: _____

Staff Signature: _____ Date Returned to Inmate: _____

D. FORMAL LEVEL

If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response.

Signature: _____ Date Submitted: _____

Note: Property/Funds appeals must be accompanied by a completed Board of Control form BC-1E, Inmate Claim

CDC Appeal Number:

40

First Level ☐ Granted ☐ P. Granted ☐ Denied ☐ Other _____

E. REVIEWER'S ACTION (Complete within 15 working days): Date assigned: _____ Due Date: _____

Interviewed by: _____

Staff Signature: _____ Title: _____ Date Completed: _____

Division Head Approved: Returned

Signature: _____ Title: _____ Date to Inmate: _____

F. If dissatisfied, explain reasons for requesting a Second-Level Review, and submit to institution or Parole Region Appeals Coordinator within 15 days of receipt of response.

Signature: _____ Date Submitted: _____

Second Level ☐ Granted ☐ P. Granted ☐ Denied ☐ Other _____

G. REVIEWER'S ACTION (Complete within 10 working days): Date assigned: _____ Due Date: _____

☐ See Attached Letter

Signature: _____ Date Completed: _____

Warden/Superintendent Signature: _____ Date Returned to Inmate: _____

H. If dissatisfied, add data or reasons for requesting a Director's Level Review, and submit by mail to the third level within 15 days of receipt of response.

Signature: _____ Date Submitted: _____

For the Director's Review, submit all documents to: Director of Corrections
P.O. Box 942883
Sacramento, CA 94283-0001
Attn: Chief, Inmate Appeals

DIRECTOR'S ACTION: ☐ Granted ☐ P. Granted ☐ Denied ☐ Other _____

☐ See Attached Letter

Date: _____

CDC 602 (12/87)

Further, I attempted informal resolution of this issue by writing to Mr. A.P. Kane on 3-20-01-see attached. His response indicates the issue is still open and now I am exercising my right to appeal.

Action requested:

1. Processing of my appeal.
2. A statement indicating my appeal will not be processed (if you still choose to reject my appeal) and my administrative remedies are exhausted.

6/25/01

Viet Mike Ngo
E-21895
Avenal State Prison
P.O. Box 8
Avenal, Calif. 93204
In Pro Per

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

VIET MIKE NGO, Plaintiff, v. J.S. WOODFORD, et al., Defendants.	CASE NO. C 01-20674 (JF) NOTICE OF APPEAL MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS AFFIDAVIT IN SUPPORT OF MOTION

(Filed May 29, 2003)

Notice is hereby given that Viet M. Ngo, plaintiff in the above named case, hereby appeals to the United States Court of Appeal for the Ninth Circuit from the Order Granting Defendants' Motion to Dismiss filed in this action on May 5, 2003.

Plaintiff Viet Mike Ngo also moves for permission to appeal in Formal Pauperis because he is incarcerated without means to advance this appeal without proceeding in forma pauperis.

/s/ V. M. Ngo
Viet Mike Ngo
In Pro Per
E-21895
Avenal State Prison

AFFIDAVIT OF VIET MIKE NGO

I, Viet Mike Ngo declare as follows:

1. I am the plaintiff in this matter.

2. I am housed at Avenal State Prison. I have a scheduled court appearance in Marin County Superior Court on June 23, 2003 before Judge Dufficy, Case No. 020462).

   I also have an evidentiary hearing scheduled before Judge Adams in Marin County Superior Court in July.

   I have not been advised when I will be transported for these Court dates.

3. When I am on Out to Court status I do not have access to all my legal property or to a law library.

4. I do not have the means to appeal the Order Granting Defendants' Motion to Dismiss unless I be permitted to proceed in forma pauperis and request that the appeal be heard based on the original record without reproducing any part.

5. My issue on appeal is that irregularities in the administrative process itself prohibited me from exhausting my administrative remedies. The San Quentin Appeals Coordinator interfered with my pursuit of relief.

I reasonably and in good-faith attempted to pursue my appeals. the Appeals Coordinator improperly and incorrectly rejected two appeals I submitted on each of the claims in my case stating I had not filed my appeal in time.

I maintain that my appeals were timely filed and improperly rejected. I also maintain that I am unable to file the appeal to the next level of review once it is screened out by the appeals coordinator. Accordingly, there was not another level of administrative review available to me.

I claim that the Court did not establish the availability of an administrative remedy from a legally sufficient source before dismissing my complaint (See **Snider v. Melindez 199 F. 3d 108 (2nd Cir 1999)**

6. I have completed a Prisoner's In Formal Pauperis application and am submitting it with this affidavit and Notice of Appeal. In order to timely file my Notice of Appeal I require additional time in which to forward a Certificate of Funds In Prisoner's Account from Avenal State Prison.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of May, 2003 at Avenal, California.

/s/ V. M. Ngo
Viet Mike Ngo
In Pro Per

(5)

No. 05-416

FILED
DEC 23 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

JEANNE S. WOODFORD and ANTHONY P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MADEIROS
State Solicitor General
JAMES M. HUMES
Chief Assistant Attorney General
FRANCES T. GRUNDER
Senior Assistant Attorney General
THOMAS S. PATTERSON
Supervising Deputy Attorney General
JENNIFER G. PERKELL
Deputy Attorney General
Counsel of Record
State Bar No. 203205
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5726
Fax: (415) 703-5843
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under the Prison Litigation Reform Act, a prisoner cannot bring suit to challenge prison conditions under federal law "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

This case presents the following question:

Does a prisoner satisfy the Prison Litigation Reform Act's administrative exhaustion requirement by filing an untimely or otherwise procedurally defective administrative appeal that is rejected by prison officials?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. The Prison Litigation Reform Act	2
B. California's Administrative Appeals System	3
C. Factual History	4
D. Procedural History	6
SUMMARY OF ARGUMENT	9
ARGUMENT	13
AN INMATE DOES NOT SATISFY THE PLRA'S ADMINISTRATIVE EXHAUSTION REQUIREMENT BY FILING A PROCEDURALLY DEFECTIVE APPEAL THAT IS REJECTED BY PRISON OFFICIALS	13
A. The Text of the PLRA's Exhaustion Provision Requires an Inmate to Use, and Not Disregard, Available Administrative Processes	14
B. The History and Context of the PLRA's Exhaustion Requirement Reflect Congress's Intent For Inmates to Use, and Not Disregard, Available Administrative Processes As a Condition Precedent to Filing a Federal Action	15

TABLE OF CONTENTS – Continued

Page

C. Congress's Objectives in Enacting the PLRA's Exhaustion Requirement Would Be Thwarted by a Rule that Allowed Inmates to Disregard Available Administrative Processes 19

D. This Court's Federal Habeas Jurisprudence Supports the Argument that a Prisoner's Failure to Use the Available Administrative Process Bars a Federal Action 26

E. This Court's Decisions Construing the Administrative-Filing Requirements of Title VII and the ADEA Do Not Inform the Proper Construction of the PLRA's Exhaustion Mandate 30

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

Booth v. Churner, 532 U.S. 731 (2001) ..... *passim*

Brown v. Toombs, 139 F.3d 1102 (6th Cir. 1998) 6

Clay v. United States, 537 U.S. 522 (2003) 32

Coleman v. Thompson, 501 U.S. 722 (1991) 26, 27, 32

Edwards v. Carpenter, 529 U.S. 446 (2000) 28

EEOC v. Commercial Office Prods. Co., 486 U.S. 107 (1988) 8, 12, 31

Johnson v. Meadows, 418 F.3d 1152 (11th Cir. 2005) ... 11, 23

McCarthy v. Madigan, 503 U.S. 140 (1992) 10, 16, 20

Ngo v. Woodford, 403 F.3d 620 (9th Cir. 2005) 1

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) ..... *passim*

Overton v. Bazzetta, 539 U.S. 126 (2003) 30

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 12, 14, 27, 28, 29

Patsy v. Board of Regents of Fla., 457 U.S. 496 (1982) 2

Porter v. Nussle, 534 U.S. 516 (2002) ..... *passim*

Pozo v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002) 11, 23

Preiser v. Rodriguez, 411 U.S. 475 (1973) 17, 28, 29

Ross v. County of Bernalillo, 365 F.3d 1181 (10th Cir. 2004) 11, 23

Spruill v. Gillis, 372 F.3d 218 (3d Cir. 2004) 11, 23

Thomas v. Woolum, 337 F.3d 720 (6th Cir. 2003) ... 23, 24, 25, 32

Turner v. Safley, 482 U.S. 78 (1987) 30

Williams v. Comstock, 425 F.3d 175 (2d Cir. 2005) 23

TABLE OF AUTHORITIES – Continued

Page

Wilwording v. Swenson, 404 U.S. 249 (1971) 2

Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003) 6

STATUTES

28 United States Code
§ 1254(1) 1
§ 1915(a)(3) 19
§ 1915(b)(1)-(2) 19
§ 1915(g) 19
§ 1915A(a), (b)(1) 19
§ 2254 ..... 12, 26, 28
§ 2254(b)(1)(A) 26

29 United States Code
§ 633(b) 12, 13, 31

42 United States Code
§ 1997e 10, 18
§ 1997e(a) (2000) ..... *passim*
§ 1997e(a) (1994) 2, 9, 15, 33
§ 1997e(a), (b) (1994) 16
§ 1997e(a)(2), (b) (1994) 10
§ 1997e(c) 10, 18
§ 1997e(d)(1)(A) 10, 18
§ 1997e(e) 11, 18
§ 2000e-5(c) 12, 13, 32

Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803, § 7(a) 110 Stat.1321, 1321-71 ..... 10, 16

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

28 Code of Federal Regulations
§ 542.14(a) 4

141 Cong. Rec. H14078-02 (1995) 20

141 Cong. Rec. H14105 (1995) 20, 21

141 Cong. Rec. H14106 (1995) 20

141 Cong. Rec. S14408-01, S14418 (1995) 20

141 Cong. Rec. S14611-01, S14626 (1995) 20

Administrative Office of the U.S. Courts Judicial Facts and Figures: Multi-year Statistical Compilations of Federal Court Caseload Through Fiscal Year 2004 at Table 2.9 (Mar. 2005), *available at* http://www.uscourts.gov/judicialfactsfigures/alljfftables.pdf 22

Administrative Office of the United States Courts Annual Report of the Director 2004 at 4, 7, *available at* http://www.uscourts.gov/library/dirrpt04/2004AnnualReport_Full.pdf 22

California Code of Regulations, Title 15
§ 3084.1(c) 3
§ 3084.2(a) 3
§ 3084.2(c) 3
§ 3084.3(c)(6) 4
§ 3084.5 3
§ 3084.5(a) 3
§ 3084.5(a)(3) 3
§ 3084.5(b) 3
§ 3084.5(c) 3
§ 3084.5(d) 4

TABLE OF AUTHORITIES – Continued

Page

§ 3084.5(e)(1) 3

§ 3084.5(e)(2) 4

§ 3084.6 6

§ 3084.6(c) 2, 4, 5

California Department of Corrections, Facts And Figures, Third Quarter 2005, http://www.corr.ca.gov/CommunicationsOffice/facts_figures.asp 25

Merriam-Webster's Collegiate Dictionary 406 (10th ed. 1999) 14

U.S. Dep't of Justice, Prison and Jail Inmates at Midyear 2004 at 1 (Apr. 2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf 22

U.S. Dep't of Justice, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000 (Jan. 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/ppfusd00.txt 21

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-21, is reported at *Ngo v. Woodford*, 403 F.3d 620 (9th Cir. 2005). The district court's opinion, Pet. App. 22-26, is not reported.

JURISDICTION

The court of appeals issued its opinion on March 24, 2005, Pet. App. 1-21, and denied a timely petition for rehearing on July 1, 2005, Pet. App. 27. The petitioners invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1), filing a petition for certiorari on September 29, 2005. This Court granted the petition on November 14, 2005.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1997e(a) of title 42 of the United States Code mandates: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

Under section 3084.6(c) of title 15 of the California Code of Regulations, a prisoner must submit an administrative appeal "within 15 working days of the event or decision being appealed."

STATEMENT OF THE CASE

A. The Prison Litigation Reform Act

Although civil-rights litigants need not, as general rule, exhaust administrative remedies, *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 515-16 (1982), *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971), in 1980, Congress passed a limited exhaustion requirement for prisoner-civil-rights actions. 42 U.S.C. § 1997e(a) (1994). Congress later broadened this exhaustion prescription with its enactment of the Prison Litigation Reform Act of 1995 (PLRA). Under the PLRA, § 1997e(a) directs that "[n]o action shall be brought" under § 1983 or "any other Federal law" by a prisoner "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2000). Through the revised statute, Congress eliminated the district courts' discretion under the original statute to require exhaustion only when it was "appropriate" and "in the interests of justice," and when available administrative remedies were "plain, speedy, and effective." *Compare* 42 U.S.C. § 1997e(a) (2000) *with* 42 U.S.C. § 1997e(a) (1994). In interpreting this exhaustion mandate, this Court has held that exhaustion is required even if the specific relief the prisoner seeks is unavailable through the State's administrative process, *Booth v. Churner*, 532 U.S. 731, 741 (2001), and regardless of the

type of prison-conditions claim the prisoner is alleging, *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

B. California's Administrative Appeals System

In California, there is a four-tier administrative process available for inmates seeking to grieve conditions of confinement. Cal. Code Regs. tit. 15, § 3084.5. In order to prepare an appeal, an inmate must simply "describe the problem and action requested" on an inmate appeal form (CDC form 602). *Id.* § 3084.2(a). The appeal forms are made "readily available to all inmates." *Id.* § 3084.1(c).

The inmate must generally begin the appeals process by seeking review at the "informal" level, at which the inmate contacts the involved staff to attempt to resolve the grievance informally. *Id.* § 3084.5(a). Informal-level review is waived if the appeal concerns certain issues defined in the regulations. *Id.* § 3084.5(a)(3).

If the grievance is not resolved at the informal level, or if the informal level is waived, the inmate must then submit his appeal at the first formal level of review by forwarding the appeal to the prison's appeals coordinator within applicable time limits. *Id.* §§ 3084.2(c), 3084.5(b). This level of review may also be bypassed if the appeals coordinator determines from an initial screening of the appeal that it concerns certain issues. *Id.* § 3084.5(b).

If the inmate receives an adverse decision at the first formal level of review, or if that level has been bypassed, the inmate must proceed to the second formal level of review. *Id.* § 3084.5(c). Second-level review is conducted by the institutional head, the warden. *Id.* § 3084.5(e)(1).

If the inmate is dissatisfied with the response provided at the second formal level of review, the inmate must submit the appeal to the third formal level of review. *Id.* § 3084.5(d). Third-level review constitutes review by the director of the California Department of Corrections and Rehabilitation, and it is conducted by a designated representative of the director under the supervision of the chief of inmate appeals. *Id.* § 3084.5(e)(2).

An inmate is required to submit an administrative grievance within fifteen working days – or three weeks – of the event or decision being appealed. *Id.* § 3084.6(c).[1] Prison officials may reject an inmate appeal if "[t]ime limits for submitting the appeal are exceeded and the appellant had the opportunity to file within the prescribed time constraints." *Id.* § 3084.3(c)(6).

C. Factual History

Respondent Viet Ngo is a life prisoner in the custody of the California Department of Corrections and Rehabilitation who, during the events at issue in this case, was housed at San Quentin State Prison. J.A. 3. Mr. Ngo alleges that prison officials wrongly placed him in administrative segregation as discipline for engaging in "inappropriate activity" with a female volunteer at the San Quentin chapel. J.A. 4, 7. He contends that his confinement

---

[1] California's administrative filing deadline is substantially similar to that of the federal Bureau of Prisons, which is "20 calendar days" from "the date on which the basis for the [Administrative Remedy] Request occurred." 28 C.F.R. § 542.14(a).

in administrative segregation lasted from October 26, 2000, to December 23, 2000 – a period of about two months. J.A. 27. Mr. Ngo further claims that, as additional discipline for his alleged misconduct, at a classification-committee hearing on December 22, 2000, Defendant Kane "explicitly restricted" him from participating in a variety of prison programs, including evening fellowship and religious study sessions. J.A. 4-5.

Rather than availing himself of the opportunity to file an administrative grievance within fifteen working days of his alleged injuries, Mr. Ngo submitted his first appeal on June 18, 2001 – many months after the contested events. J.A. 26-29. In that appeal, Mr. Ngo challenged both his placement in administrative segregation and Defendant Kane's decision to prohibit him from communicating with a particular volunteer, having a personal relationship with a volunteer, and attending evening activities like education, "Alternatives to Violence," and church. J.A. 27.

The following day, on June 19, 2001, the prison's appeals coordinator advised Mr. Ngo that his appeal was untimely under section 3084.6(c) of title 15 of the California Code of Regulations. J.A. 24-26. The appeals coordinator explained that the events in question had transpired the previous year on October 26, 2000 and December 23, 2000. J.A. 26.

On June 25, 2001, Mr. Ngo filed his second appeal contesting the same events. J.A. 33-37. Mr. Ngo did not restate his grievance but simply incorporated by reference his original appeal. J.A. 33-34. He also challenged the rejection of his original appeal for untimeliness, stating that his exclusion from prison programs was "an ongoing

action" and therefore that the filing deadline under section 3084.6 did not apply to him. J.A. 34. The prison appeals coordinator again rejected the appeal, explaining that even though Mr. Ngo's exclusion from prison programs dated back to 2000, he nonetheless waited six months to address the issue. J.A. 31-33.

D. Procedural History

After Mr. Ngo's two administrative appeals were rejected as untimely, Mr. Ngo filed this lawsuit on July 18, 2001. J.A. 2-14. In the section of his preprinted form complaint entitled "Exhaustion of Administrative Remedies," he wrote in connection with each of his claims that he had filed two inmate appeals, but that the San Quentin appeals office had refused to process them because they were untimely. J.A. 3, 6, 8, 10. He also contended that his rights were still being violated on an "ongoing basis." J.A. 3, 6, 8, 10.

Defendants moved to dismiss, arguing in part that Mr. Ngo had failed to exhaust his available administrative remedies in conformity with 42 U.S.C. § 1997e(a). In the Ninth Circuit, it is the defendant's burden to raise and prove the absence of exhaustion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). *Contra Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) (holding that the prisoner must allege and show that he has exhausted state administrative remedies, and should attach the administrative decision to his complaint). In support of the motion to dismiss, Defendants relied on the complaint's allegation that prison officials rejected Mr. Ngo's two appeals as untimely. *Cf. Wyatt*, 315 F.3d at 1120 (holding that a prisoner's concession to non-exhaustion is a valid ground

for dismissal). In opposition to the motion, Mr. Ngo filed a declaration attaching the two inmate appeals and the prison's screening forms rejecting the appeals. J.A. 23-37. Because Mr. Ngo had not exhausted California's administrative process regarding his claims, the district court granted Defendants' motion and dismissed the case without prejudice. Pet. App. 24-26.

The Ninth Circuit reversed the district court's dismissal, holding that an inmate satisfies the PLRA's exhaustion requirement by filing an untimely appeal that is rejected by prison officials as procedurally deficient. Pet. App. 21. The appellate court reasoned that because Mr. Ngo's two appeals were deemed time-barred and Mr. Ngo was precluded from proceeding any further within the State's administrative system, he had therefore "completed all avenues of administrative review available to him" in conformity with the PLRA's exhaustion mandate. Pet. App. 21.

The court of appeals began its analysis by disparaging Congress's motivation in proposing the PLRA, and by criticizing the legislative process supporting the statute's enactment as insufficiently thorough. Pet. App. 4-6. As the principal basis for its holding that the failure to exhaust administrative remedies should not bar a subsequent federal action, the court relied on the historical distinction in federal habeas between the doctrines of exhaustion and procedural default. Pet. App. 10-17. As the court explained, exhaustion precludes federal review of a claim only if state remedies remain available, while procedural default bars federal review of a state-court judgment if the judgment is supported by an "adequate and independent" state ground. Pet. App. 10, 13-14. Although the court acknowledged this Court's merger of exhaustion with

procedural default, it nonetheless concluded that because state sovereignty is "less threatened" by federal review of a non-criminal, state-administrative process, as opposed to a state court's judgment, no analogy could be made to federal habeas in support of reading a procedural-default mechanism into the PLRA's exhaustion requirement. Pet. App. 14.

The appeals court was additionally persuaded in its holding by the language of the PLRA, observing that nothing in the statute explicitly mentions procedural default, indicates "an intent to bar suits by prisoners who fail to meet administrative time requirements mandated by prisons," or instructs on the applicable standard of review for prison administrative findings. Pet. App. 15. Moreover, the court dismissed Defendants' argument that a procedural-default bar is necessary to ensure compliance with Congress's firm exhaustion mandate, instead taking it on faith that inmates would have "every incentive" to seek administrative review of their claims. Pet. App. 16 ("We have no reason to believe that prisoners will not avail themselves of the most efficient mechanism to remedy a violation of federal law.") (internal quotation marks omitted). Finally, the court extracted support for its holding from this Court's decisions that the unique administrative filing requirements of Title VII and the Age Discrimination in Employment Act (ADEA) do not contain a procedural-default component that could foreclose federal relief. Pet. App. 18-20 (citing *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123 (1988); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761-62 (1979)).

SUMMARY OF ARGUMENT

The PLRA requires inmates to exhaust those administrative remedies "as are available" before they are permitted to file a federal action concerning prison conditions. 42 U.S.C. § 1997e(a). In this case, by disregarding the opportunity to file an administrative appeal within fifteen working days of his alleged injuries, Mr. Ngo failed to avail himself of the administrative remedy that was available to him. Accordingly, he failed to exhaust the available administrative remedies in conformity with § 1997e(a). This conclusion is mandated by the statute's text and context. This Court has concluded that the term "remedies" in § 1997e(a) refers not to a specific form of relief, but to the administrative process itself. *Booth v. Churner*, 532 U.S. 731, 739 (2001). In light of this definition, the question of what remedies are "available" turns on what administrative process the inmate has a right to invoke to internally grieve a claim. In order to exhaust available administrative remedies in compliance with the statute, prisoners must take advantage of the administrative process offered by the State before filing a federal action. If a prisoner instead submits a procedurally defective grievance, he has necessarily not exhausted the available administrative process.

The textual evolution of § 1997e(a) confirms Congress's intent that inmates not be permitted to "exhaust" by defaulting on state-administrative-grievance procedures. Through the PLRA, Congress eliminated the district courts' discretion to require exhaustion only when it was "appropriate" and "in the interests of justice," and available administrative remedies were "plain, speedy, and effective." *Compare* 42 U.S.C. § 1997e(a) (2000) *with* 42 U.S.C. § 1997e(a) (1994). It further dispensed with the

requirement that administrative remedies satisfy minimum standards of fairness and effectiveness. *Compare* 42 U.S.C. § 1997e(a) (2000) *with* 42 U.S.C. § 1997e(a)(2), (b) (1994). This Court has presumed that these changes were in direct response to its earlier decision in *McCarthy v. Madigan*, 503 U.S. 140, 150-51 (1992), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, sec. 803, § 7(a), 110 Stat. 1321, 1321-71 (codified as amended at 42 U.S.C. § 1997e(a)), in which the Court relied on the former § 1997e(a)'s express wording to hold that a federal prisoner who sought only monetary damages was not required to exhaust administrative remedies. *Booth*, 532 U.S. at 739-40. Thus, as this Court has now twice held in construing the revised statute, by rendering § 1997e(a)'s original statutory scheme "a thing of the past," *id.* at 739, and by substituting in its place a firm exhaustion mandate, Congress has clearly evinced its intent that inmates not be allowed to avoid the exhaustion process, *Porter v. Nussle*, 534 U.S. 516, 530 (2002); *Booth*, 532 U.S. at 740-41.

The PLRA's overall design in deterring frivolous or unnecessary prisoner litigation further underscores the conclusion that § 1997e(a) must be read to bar federal actions by inmates who have not first employed the State's available administrative process. For example, in addition to the exhaustion requirement, § 1997e requires district courts to dismiss, even sua sponte, any suit brought by a prisoner that is "frivolous, malicious, [or] fails to state a claim upon which relief can be granted." 42 U.S.C. § 1997e(c). It also limits an award of attorneys' fees to those fees "directly and reasonably incurred in proving an actual violation of the plaintiff's rights," *id.* § 1997e(d)(1)(A), and prohibits complaints for emotional injury without a prior

showing of physical injury, *id.* § 1997e(e). Viewed in the context of these other restrictions, § 1997e(a) must be construed to effectuate Congress's goal of reducing the enormous volume of unmeritorious prisoner actions filed in the federal courts. Therefore, the exhaustion provision can only be interpreted to mandate an inmate's proper resort to the State's administrative-review process as a condition precedent to filing suit.

Congress's purposes in revising § 1997e(a) reinforce the conclusion that, in order to exhaust, an inmate must comply with available administrative procedures. This Court has confirmed that Congress's objectives with the revised statute were to afford correctional officials "time and opportunity" to: (1) address, and perhaps ameliorate, inmate complaints internally before litigation ensues; (2) filter out frivolous claims; and (3) create an administrative record that would aid adjudication of cases ultimately brought to court. *Porter*, 534 U.S. at 524-25. These goals cannot be realized through an inmate's submission of a procedurally defective administrative grievance that is never considered on the merits because of its deficiencies. Indeed, four circuits have expressly cited the need to serve Congress's policy aims in holding that lawsuits by inmates who fail to properly employ available administrative grievance procedures should be barred. *Johnson v. Meadows*, 418 F.3d 1152, 1158-59 (11th Cir. 2005); *Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004); *Pozo v. McCaughtry*, 286 F.3d 1022, 1023-24 (7th Cir. 2002).

An analogy to federal habeas law further bolsters the argument that an inmate cannot initiate a federal action

unless he has first properly invoked the State's administrative-review process. The federal-habeas-exhaustion requirement, now codified at 28 U.S.C. § 2254 (2000), is grounded in principles of comity, which dictate that a state prisoner must give the state courts the first opportunity to act on his claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). In order to protect the habeas-exhaustion requirement's efficacy in facilitating these comity concerns, this Court has held that a prisoner who fails to properly comply with state procedural requirements is prohibited from proceeding with a subsequent federal action. *Id.* at 848. Similarly, this Court has recognized that one of the primary objectives of the PLRA's exhaustion mandate is to afford state correctional officials the "time and opportunity" to address inmate complaints before a federal lawsuit is filed. *Porter*, 534 U.S. at 524-25. Because the policy considerations underlying federal-habeas exhaustion are analogous to those underlying PLRA exhaustion, both the rationale for and utility of a procedural-default mechanism in federal habeas apply under the PLRA.

Unlike this Court's federal-habeas jurisprudence, this Court's decisions interpreting the administrative-filing provisions of two other federal statutes – the ADEA and Title VII – do little to inform § 1997e(a)'s proper construction. This Court has held that a state-procedural default does not foreclose federal relief under those two statutes precisely because of those statutes' unique wording and definitions. *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123-24 (1988); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 759-61 (1979). Specifically, both the ADEA and Title VII contain a "commencement" requirement. *See* 29 U.S.C. § 633(b) (2000); 42 U.S.C. § 2000e-5(c) (2000). Moreover, state proceedings are "commenced" under the terms of

both statutes solely by the filing of a signed statement of the facts at issue. *See* 29 U.S.C. § 633(b); 42 U.S.C. § 2000e-5(c). This Court has held that, with this special limiting definition of "commencement," Congress necessarily excluded the possibility of a procedural-default bar based on the failure to comply with state procedural requirements. *Oscar Mayer*, 441 U.S. at 759-60. In stark contrast to Title VII and the ADEA, the PLRA contains an exhaustion requirement that does not merely defer a federal action, but is rather a mandatory condition precedent to filing suit. *See Booth*, 532 U.S. at 741; *Porter*, 534 U.S. at 524. Moreover, the PLRA does not qualify this Court's traditional understanding of "exhaustion" with any limiting language.

ARGUMENT

AN INMATE DOES NOT SATISFY THE PLRA'S ADMINISTRATIVE EXHAUSTION REQUIREMENT BY FILING A PROCEDURALLY DEFECTIVE APPEAL THAT IS REJECTED BY PRISON OFFICIALS.

A procedurally defective inmate appeal that is rejected by prison officials does not satisfy the PLRA's exhaustion requirement. Instead, an inmate only exhausts administrative remedies under § 1997e(a) by properly availing himself of the available administrative-review process. The Ninth Circuit has disregarded the exhaustion statute's express mandate and Congress's purposes in invigorating § 1997e(a) by holding that an inmate can "exhaust" administrative remedies by not complying with state filing requirements.

A. The Text of the PLRA's Exhaustion Provision Requires an Inmate to Use, and Not Disregard, Available Administrative Processes.

The PLRA's language requires inmates to fully invoke the administrative process that the State offers. Section 1997e(a) precludes a prisoner from filing unless he has first "exhausted" those administrative "remedies" that are "available." 42 U.S.C. § 1997e(a). Since the verb "exhaust" means to "consume entirely" or "use up," the word "exhausted" in the statute refers to the state of being consumed or used up. Merriam-Webster's Collegiate Dictionary 406 (10th ed. 1999). In conformity with this common understanding of the term "exhaust," this Court has held that "remedies" as used in § 1997e(a) necessarily refers to the State's administrative process because "one 'exhausts' processes, not forms of relief." *Booth v. Churner*, 532 U.S. 731, 739 (2001).

Under this interpretation of the statutory language – that it is the administrative *process* that must be exhausted – the modifier "available" can only refer to those administrative procedures that an inmate has a right to invoke *before* he has rendered those procedures obsolete by defaulting on them. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 847 (1999) (holding that the exhaustion doctrine "turns on an inquiry into what procedures are 'available' under state law"). In this case, the Ninth Circuit held that Mr. Ngo had "exhausted all remedies available to him as required by the PLRA" by filing an untimely grievance, the rejection of which precluded him from proceeding any further within the State's administrative system. Pet. App. 21. Thus, the appeals court interpreted "available" entirely out of context as referring to what, if any, administrative

procedures can be invoked at the exact moment the inmate chooses to file a lawsuit. This is wholly at odds with § 1997e(a)'s meaning of "remedies" as constituting the administrative process itself. A directive that prisoners must exhaust administrative processes is of course entirely superfluous if prisoners can, by their own conduct, readily render those processes "unavailable" by defaulting on state filing deadlines or other procedural requirements. In this case, because Mr. Ngo filed an untimely grievance that was properly rejected, and thus never considered at any level of administrative review, he did not exhaust the administrative-grievance procedures available for prisoners in California. Thus, Mr. Ngo failed to exhaust his available administrative remedies within the meaning of § 1997e(a).

B. The History and Context of the PLRA's Exhaustion Requirement Reflect Congress's Intent For Inmates to Use, and Not Disregard, Available Administrative Processes As a Condition Precedent to Filing a Federal Action.

Congress's intent that inmates fully avail themselves of administrative-grievance proceedings as a mandatory condition precedent to filing a federal action is confirmed by Congress's sweeping changes to § 1997e(a) with the PLRA's enactment. Before the PLRA, prisoners were not required to exhaust administrative remedies unless a district court first determined that exhaustion would be "appropriate" and "in the interests of justice." 42 U.S.C. § 1997e(a) (1994). Moreover, administrative remedies needed to be "plain, speedy, and effective," *id.*, and satisfy "minimum standards" of fairness and effectiveness, *id.*

§ 1997e(b). But through the 1996 revisions to the exhaustion statute, Congress eliminated both the district court's discretion to excuse inmates from the need to exhaust, and the requirements that administrative remedies meet minimum standards of efficiency and effectiveness. *Compare* 42 U.S.C. § 1997e(a) (2000) *with* 42 U.S.C. § 1997e(a), (b) (1994). This Court has presumed that these changes were in direct response to its earlier decision in *McCarthy v. Madigan*, 503 U.S. 140, 150-51 (1992), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, sec. 803, § 7(a), 110 Stat. 1321, 1321-71 (codified as amended at 42 U.S.C. § 1997e(a)), wherein the Court relied on the expressly conditional nature of the former exhaustion provision to hold that a federal prisoner who sought only monetary damages was not required to exhaust the Bureau of Prisons' administrative grievance procedures before filing a federal action. *Booth v. Churner*, 532 U.S. 731, 739-40 (2001). Therefore, in an apparent effort to "preclude the *McCarthy* result," *id.* at 740, Congress has now "mandated exhaustion clearly enough," *id.* at 741.[2]

This Court's decisions construing the revised statute reflect this Court's recognition that Congress, in broadening the exhaustion prescription, sought to foreclose an inmate's ability to circumvent available administrative processes. In *Booth v. Churner*, 532 U.S. at 741, this Court

---

[2] Although in *McCarthy*, this Court declined to find an administrative-exhaustion requirement in the former § 1997e(a), the Court assumed that if Congress had mandated exhaustion, a procedural-default rule would necessarily attach to that requirement. 503 U.S. at 152-53 (noting that a cost of failing to comply with administrative filing deadlines is "forfeiture of a claim").

held that the revised statute requires inmates to resort to the administrative process even when they limit their prayer for relief to a form of redress not available through prison-grievance proceedings. In support of this holding, the Court observed that "Congress's imposition of an obviously broader exhaustion requirement makes it highly implausible that it meant to give prisoners a strong inducement to skip the administrative process." *Id.* at 740-41. Subsequently, in *Porter v. Nussle*, 534 U.S. 516, 524, 532 (2002), this Court held that an inmate cannot avoid the exhaustion obligation merely by characterizing his complaint as alleging a single incident of excessive force. The Court concluded: "It seems unlikely that Congress, when it included in the PLRA a firm exhaustion requirement, meant to leave the need to exhaust to the pleader's option." *Id.* at 530 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973) ("It would wholly frustrate explicit congressional intent to hold that [prisoners] could evade this [exhaustion] requirement by the simple expedient of putting a different label on their pleadings.")).

This Court's understanding that Congress expected inmates to "exhaust" administrative remedies by actual use of available administrative processes is also evidenced in *Porter's* recognition that Congress's objectives in mandating exhaustion were to afford correctional officials "time and opportunity" to address complaints internally before litigation ensued, to filter out frivolous claims, and to create an administrative record that would facilitate litigation. *Id.* at 524-25. None of these statutory aims can be accomplished through an inmate's submission of an untimely or otherwise procedurally defective grievance that is rejected and thus never considered on the merits

by prison officials. *See id.* at 525 n.4 (noting that Congress's revisions to § 1997e(a) may have indicated Congress's belief that this Court, in the past, had been "shortsighted in failing to adequately recognize the utility of the *administrative process* to satisfy, reduce, or clarify prisoner grievances" (emphasis added) (internal citation omitted)).

Notwithstanding the Ninth Circuit's characterization that an inmate exhausts, as opposed to evades, administrative remedies by filing an untimely appeal that is rejected, the Ninth Circuit's rule nonetheless permits inmates to do exactly what *Booth* and *Porter* held Congress deliberately sought to proscribe by enacting the PLRA's firm exhaustion directive – that is, to circumvent the State's available administrative review process. Pet. App. 21. As this Court concluded in those decisions, such a result runs contrary to both § 1997e(a)'s language in mandating resort to the administrative process and Congress's intent in requiring exhaustion.

Congress's intent to require prisoners to use an available administrative-grievance process is also apparent from the PLRA's overriding objective of deterring frivolous or unnecessary prisoner litigation, evident in numerous of its provisions. For example, § 1997e obligates the district courts to dismiss, sua sponte or on a party's motion, any suit brought by a prisoner that is "frivolous, malicious, [or] fails to state a claim upon which relief can be granted." 42 U.S.C. § 1997e(c). It also limits an award of attorneys' fees to fees that were "directly and reasonably incurred in proving an actual violation of the plaintiff's rights." *Id.* § 1997e(d)(1)(A). And it bars complaints for emotional injury without a prior showing of physical injury. *Id.* § 1997e(e). Concerning proceedings *in forma pauperis*, the PLRA requires prisoners to pay the full amount of their

filing fees when they have funds available, 28 U.S.C. § 1915(b)(1)-(2), denies *in forma pauperis* status for appeals that the district court certifies are not taken in good faith, *id.* § 1915(a)(3), and denies such status to prisoners who have on three or more occasions while in prison brought an action or appeal that was dismissed as frivolous, malicious, or failing to state a claim, *id.* § 1915(g). The PLRA also directs the district courts to perform an initial screening of any prisoner action brought against a public entity, officer, or employee, and to dismiss the complaint if it is frivolous, malicious, or fails to state a claim. *Id.* § 1915A(a), (b)(1). An exhaustion rule that enables inmates to side-step the State's administrative review process – which, as this Court has recognized, might obviate the need for litigation – cannot be reconciled with the design of the PLRA in ensuring that only cases with true merit reach the federal courts. *Porter*, 534 U.S. at 525.

C. Congress's Objectives in Enacting the PLRA's Exhaustion Requirement Would Be Thwarted by a Rule that Allowed Inmates to Disregard Available Administrative Processes.

Congress's objectives in establishing a strict exhaustion mandate would be subverted by a rule that allowed a prisoner to "exhaust" state remedies by failing to use an available administrative process. The PLRA's legislative history reflects that Congress sought to reduce the burden of unnecessary prison litigation on the federal courts and believed that an administrative-exhaustion requirement would be an essential tool in effectuating this goal. As one sponsor of the PLRA stated, the purpose of the Act is to

"help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits," remarking that "it is time to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners." 141 Cong. Rec. S14408-01, S14418 (1995) (Sen. Hatch). In reciting a number of features of the Act designed to limit frivolous prisoner lawsuits, another of its sponsors specifically identified the requirement of state prisoners "to exhaust all administrative remedies before filing suit." 141 Cong. Rec. S14611-01, S14626 (1995) (Sen. Dole).

Congress also expressed concern about the increasing number of district-court cases filed by federal prisoners following this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992). As one House member explained, "[t]he real problem with these cases came with the Court's decision in 1992 that an inmate need not exhaust the administrative remedies available prior to proceeding with a *Bivens* action for money damages only." 141 Cong. Rec. H14078-02, H14105 (1995) (Rep. LoBiondo). "In order to address the problem of *Bivens* actions," Congress sought to "require that all cases brought by Federal inmates contesting any aspect of their incarceration be submitted to administrative remedy process before proceeding to court." *Id.*; *see also id.* at H14106 (1995) (Rep. Canady) (reasoning that "by forcing prisoners to exhaust all administrative remedies before bringing suit in Federal court," the new legislation would "significantly curtail the ability of prisoners to bring frivolous and malicious lawsuits"). Congress envisioned that an administrative-exhaustion requirement would benefit both prison management and the federal courts:

> By returning these cases to the Federal Bureau of Prisons, we will provide the opportunity for early resolution of the problem, we will reduce the intrusion of the courts into the administration of prisons, and we will provide some degree of fact-finding so that when or if the matter reaches Federal court there will be a record upon which to proceed in a more efficient manner.

Id. at H14105 (1995) (Rep. LoBiondo). Indeed, in *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002), this Court held that Congress had "beyond doubt" invigorated the exhaustion statute in order to "reduce the quantity and improve the quality of prisoner suits" by affording correctional officials the time and opportunity to take corrective action that might satisfy the inmate and obviate the need for litigation, to filter out frivolous claims, and to create an administrative record that would be beneficial in the event that litigation ultimately ensues.

A comparison of the number of prisoner suits filed before and after the PLRA's enactment suggests that the Act has resulted in Congress's intended effect of reducing the volume of prisoner litigation in the federal courts. For example, in 1995, a total of 41,679 prisoner-civil-rights suits were filed. U.S. Dep't of Justice, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000 (Jan. 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/ppfusd00.txt. But by 2000, that number had dropped precipitously to 25,504. *Id.* Even more dramatic was the decline in the *rate* that inmate suits were filed, with 37 prisoner-civil-rights suits per 1,000 inmates filed in 1995, compared to 19 suits per 1,000 inmates in 2000 – roughly a 50 percent decrease. *Id.* Since 2000, the reduction in both the overall number of prisoner-civil-rights suits and the rate at which such suits are filed has remained

fairly consistent, with an overall continued slight drop. In 2004, 23,449 prisoner-civil-rights suits were filed, Administrative Office of the U.S. Courts, Judicial Facts and Figures: Multi-year Statistical Compilations of Federal Court Caseload Through Fiscal Year 2004 at Table 2.9 (Mar. 2005), *available at* http://www.uscourts.gov/judicialfactsfigures/alljfftables.pdf, which computes to approximately 16 suits per 1000 inmates, *see* U.S. Dep't of Justice, Prison and Jail Inmates at Midyear 2004 at 1 (Apr. 2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf (recording a total of 1,494,216 state and federal prisoners in mid-year 2004).

Congress's success under the PLRA in reducing the burden of prisoner litigation on the federal courts will undoubtedly be reversed if inmates are permitted to file suit without first fully invoking the administrative review process. In financial terms alone, the impact on the federal courts of an increase in prisoner litigation will be profound. Although the federal judiciary's funding level for fiscal year 2005 was $5.426 billion, in 2004, the Director of the Administrative Office of the courts reported that the federal judiciary faced "unprecedented funding challenges" over the next several years due to overall budget constraints, and that estimates show a funding gap for the federal judiciary approaching $848 million by fiscal year 2009. Administrative Office of the United States Courts, Annual Report of the Director 2004 at 4, 7, *available at* http://www.uscourts.gov/library/dirrpt04/2004AnnualReport_Full.pdf. The Director further reported that budget cuts left six percent of federal-court jobs vacant that year. *Id.* at 8.

Beyond purely financial considerations, the facts in this case illustrate other ways in which Congress's goals

are undermined by an inmate's failure to properly resort to administrative grievance procedures. Because Mr. Ngo filed his first appeal many months after the time limits imposed by California regulations, prison officials did not review the merits of his claims before they reached the federal-court system. By that point, it was far too late for the prison to investigate his allegations and take any remedial action that might have obviated the need for litigation – for example, Mr. Ngo's contested confinement in administrative segregation had ended approximately seven months earlier. J.A. 27. In addition, there is no administrative record that could have facilitated the litigation by assisting the trial court in delineating the contours of the controversy – whether at the initial screening stage, upon dispositive motion, or at trial.

Despite the overwhelming statistical and anecdotal evidence suggesting that without a procedural-default bar, inmates do not readily avail themselves of the administrative-grievance process, the Ninth Circuit declared in this case that a procedural-default mechanism is not necessary to effectuate Congress's policy objectives because prisoners nonetheless "have every incentive to seek administrative review before suing in federal court." Pet. App. 17. This speculative proposition, however, is undermined not only by those cases that have led the Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits to rule on the issue whether an untimely appeal satisfies the PLRA's exhaustion mandate, but by the facts of this case. *See Williams v. Comstock*, 425 F.3d 175 (2d Cir. 2005); *Johnson v. Meadows*, 418 F.3d 1152 (11th Cir. 2005); *Spruill v. Gillis*, 372 F.3d 218 (3d Cir. 2004); *Ross v. County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004); *Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003); *Pozo v. McCaughtry*, 286 F.3d 1022

(7th Cir. 2002). For example, the record in this matter demonstrates that Mr. Ngo did not file his first administrative appeal concerning his complained-of placement in administrative segregation until eight months after that confinement began, and six months after it concluded. J.A. 26-29. Accordingly, notwithstanding the Ninth Circuit's curious remark to the contrary, this case evidences exactly the kind of "protracted delay," if not "deliberate[] bypass[]," of the administrative system that Congress intended to prevent through a strict exhaustion mandate. Pet. App. 17.

Moreover, the Ninth Circuit's assumption that inmates will be inherently inclined to comply with state administrative-grievance procedures because they "offer prisoners the fastest route to a remedy" rests on the unsubstantiated premise that all inmates seeking to file a federal lawsuit are pursuing legitimate claims in good faith. Pet. App. 16. Such a presumption, however, "disregards the finding of Congress that prisoners all too often were *not* acting in good faith, and the judgment of Congress this problem could best be addressed through a requirement of mandatory exhaustion." *Thomas*, 337 F.3d at 753 (emphasis in original) (Rosen, J., dissenting in part and concurring in judgment). It is precisely those inmates who have no legitimate expectation of receiving relief from prison officials who would be most motivated to ignore state filing deadlines and other procedural requirements.

In addition, a rule that inmates can satisfy the administrative-exhaustion requirement as long as they, at some point, offer the prison a chance to pass on their claims, Pet. App. 17, utterly disregards that administrative-filing deadlines are established for specific reasons – such as, to ensure prompt investigation of an inmate's grievance

when memories are still fresh, the evidence and involved parties are still accessible, and remedial action that could satisfy the inmate is still possible, *see Thomas*, 337 F.3d at 753 (Rosen, J., dissenting in part and concurring in judgment); *see also Porter*, 534 U.S. at 525 (holding that a court action could be facilitated by "an administrative record that clarifies the contours of the controversy"). These concerns have particular force in the prison setting, where correctional staff may deal with hundreds, if not thousands, of inmates during their careers in an equal number of situations, many of which are virtually identical, and thus indistinguishable with the passage of time. For example, if an inmate accuses an exercise-yard-control officer of denying the inmate entrance to the yard on a particular day out of retaliation, the officer could be hard-pressed to recall several months after the fact why he denied the inmate access or even if he denied the inmate access.

Moreover, administrative-filing deadlines establish clear guidelines and standards that enable prison officials to respond to the never-ending barrage of inmate complaints in a consistent, orderly, and fair manner. The assumption that prison officials could readily address an inmate appeal whenever the inmate finally sees fit to file one altogether ignores the utility of these deadlines in facilitating prison management and, in turn, benefitting the inmates by ensuring that their grievances receive thorough review on the merits.[3] In other words, the

[3] In the third quarter of 2005, there were over 166,000 offenders in the custody of the California Department of Corrections and Rehabilitation. California Department of Corrections, Facts And Figures, Third Quarter 2005, http://www.corr.ca.gov/CommunicationsOffice/facts_figures.asp.

supposed "opportunity" cited by the Ninth Circuit to address an inmate appeal filed many months, or even years, after the event is, for all practical purposes, no such thing. Pet. App. 17.

D. This Court's Federal Habeas Jurisprudence Supports the Argument that a Prisoner's Failure to Use the Available Administrative Process Bars a Federal Action.

An analogy to the federal-habeas context lends support to the argument that an inmate's failure to comply with the available administrative process should prevent the inmate from proceeding in federal court. Under 28 U.S.C. § 2254, relief in federal habeas is prohibited "unless" the prisoner "has exhausted the remedies available in the courts of the State," 28 U.S.C. § 2254(b)(1)(A), just as the PLRA mandates that no federal prison-conditions action shall be brought "until such administrative remedies as are available are exhausted," 42 U.S.C. § 1997e(a). In order to protect the integrity of the exhaustion requirement in federal habeas, this Court has repeatedly held that the failure to exhaust the available state-court process bars a federal action. The policy concerns that form the basis for a so-called "procedural-default" mechanism in federal habeas similarly underlie the PLRA's comparable exhaustion requirement and favor the reading of a procedural-default bar into § 1997e(a) when an inmate does not employ the State's administrative grievance procedures.

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court held that the prisoner – who had been sentenced to death by the trial court – had forfeited his claims in

federal habeas because he missed the State's deadline for filing a notice of appeal by a mere three days. *Id.* at 726-27, 757. While explaining that procedural default in federal habeas derives from the independent-and-adequate-state-ground doctrine, the Court emphasized that when the independent state ground is a state procedural default, "an additional concern comes into play." *Id.* at 731. That additional concern is this Court's longstanding rule requiring dismissal of a state prisoner's federal habeas petition if available state remedies have not been exhausted. *Id.* The Court noted that this exhaustion requirement "is also grounded in principles of comity," whereby in a federal system "the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Id.*

In *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999), this Court relied on the comity concerns it identified in *Coleman* to hold that a prisoner must seek discretionary review with the state supreme court in order to exhaust administrative remedies and thus preserve the right to a forum in federal habeas:

> Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.

In reaching this conclusion, the Court rejected a technical reading of exhaustion as referring to the mere absence of state remedies at the time the prisoner petitions in federal

court because, under such a narrow interpretation, a prisoner could "evade" the exhaustion obligation, and thus "undercut the values that it serves," by "letting the time run" on state remedies. *Id.* at 848 (internal quotation marks omitted). Instead, in order to "protect the integrity" of the federal exhaustion rule, the Court held that a prisoner must "*properly*" exhaust his state remedies by "*fairly*" presenting his claims to the state courts. *Id.* at 848 (emphasis in original) (internal quotation marks omitted).

In *Edwards v. Carpenter*, 529 U.S. 446 (2000), this Court again affirmed "the inseparability" of the exhaustion rule and the procedural-default doctrine, *id.* at 452, by holding that the presentation of an ineffective-assistance-of-counsel claim to the state court in noncompliance with the State's procedural rules was insufficient to exhaust state remedies for that claim, *id.* at 453-54. The Court reasoned that, just as the exhaustion mandate's comity objectives would be "utterly defeated" if a prisoner were able to render state remedies unavailable by allowing filing deadlines to expire, those objectives "would be no less frustrated were we to allow federal review to a prisoner who had *presented* his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it." *Id.* at 453 (emphasis in original) (internal citation and quotation marks omitted).

Moreover, this Court has expressly held that the principle of federal-state comity underlying § 2254's exhaustion rule "has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked." *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973). In *Preiser*, the Court held that a writ

of habeas corpus is the sole federal remedy available for prisoners seeking release from imprisonment for an alleged error in the fact or duration of their confinement. *Id.* at 500. The Court rejected the prisoners' argument that the concerns that require affording a state court the first opportunity to correct its own errors do not apply in the context of prison administrative proceedings. *Id.* at 491. The Court explained: "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Id.* at 491-92. Because the "internal problems of state prisons involve issues so peculiarly within state authority and expertise," the Court concluded that the States "have an important interest in not being bypassed in the correction of those problems." *Id.* at 492. For these reasons, the Court held that the "strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require the States the first opportunity to correct the errors made in the internal administration of their prisons." *Id.*

The rationale for a procedural-default bar is equally compelling under the PLRA. As in the federal-habeas context, the PLRA's exhaustion mandate is rendered meaningless by a rule that permits prisoners to "exhaust" state remedies by not complying with the available state process. Furthermore, the comity concerns underlying federal-habeas exhaustion animate PLRA exhaustion. Just as comity dictates that the State must have the "first opportunity" to review and perhaps provide relief for a habeas petitioner's claim, *O'Sullivan*, 526 U.S. at 844, analogous concerns require that state correctional officials

be afforded the "time and opportunity" to address, and possibly rectify, inmate complaints before a § 1983 action can be filed. *Porter v. Nussle*, 534 U.S. 516, 525 (2002). Moreover, this Court has repeatedly held that the federal courts are required to accord substantial deference to the informed discretion of prison officials in making the difficult judgments concerning prison administration, just as in federal habeas they must yield to the state courts in initially passing on a prisoner's claims. *See, e.g.*, *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *Turner v. Safley*, 482 U.S. 78, 89-90 (1987). Accordingly, the rule in federal habeas that an inmate's failure to avail himself of the remedies offered by the State applies with equal force under the PLRA for the identical purposes of protecting the integrity of the federal exhaustion mandate and ensuring its purposes are fulfilled.

E. This Court's Decisions Construing the Administrative-Filing Requirements of Title VII and the ADEA Do Not Inform the Proper Construction of the PLRA's Exhaustion Mandate.

The Ninth Circuit improperly relied on this Court's decisions interpreting the unique administrative-filing requirements in the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act as support for its holding that an inmate's failure to comply with state-grievance procedures cannot bar federal relief. Pet. App. 18. Because the statutory language on which those decisions were based is inapposite to the PLRA's exhaustion requirement, those decisions are not instructive.

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), this Court addressed the ADEA's requirement that no

federal action be brought "before the expiration of sixty days after proceedings have been commenced under state law." *Id.* at 759 (citing 29 U.S.C. § 633(b)). In holding that Congress did not intend to foreclose federal relief to grievants who had not satisfied state filing deadlines, the Court placed principal reliance on the wording of the statute itself. *Id.* at 759-61. The Court concluded that Congress's use of the term "commenced" "strongly implies . . . that state limitations periods are irrelevant," *id.* at 759, and emphasized that the statutory language "does not stipulate an exhaustion requirement," *id.* at 761. The Court further found that the statute's express definition of commencement necessarily excludes the possibility of a procedural-default bar based on noncompliance with state filing requirements. *Id.* at 760. Specifically, § 14(b) of the ADEA provides:

> If any requirement for the commencement of [state] proceedings is imposed by a State authority other than a requirement of the filing of written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

29 U.S.C. § 633(b). As this Court noted, state limitations periods are "of course" requirements "'other than a requirement of the filing of written and signed statement of the facts upon which the proceeding is based.'" *Oscar Mayer*, 441 U.S. at 760 (citing 29 U.S.C. § 633(b)).

In *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123 (1988), this Court likewise held that an untimely administrative filing under state law does not preclude a

federal action under Title VII. As in *Oscar Mayer*, this conclusion was premised first and foremost on the express language of the statute's state-filing provisions which, the Court noted, are "'virtually *in haec verba*'" with the filing provisions of the ADEA. *Id.* (citing *Oscar Mayer*, 441 U.S. at 755). Specifically, § 706(c) contains identical commencement language and the same limiting definition of "commencement." 42 U.S.C. § 2000e-5(c) (2000). Therefore, just like the ADEA, Title VII provides exclusively for the bare *initiation* of state proceedings.

In direct contrast with the ADEA and Title VII, the PLRA does contain an exhaustion requirement. 42 U.S.C. § 1997e(a). And unlike the ADEA and Title VII, the PLRA does not include any language that would exclude a procedural-default bar. This Court presumes that Congress "expects its statutes to be read in conformity with this Court's precedents." *Clay v. United States*, 537 U.S. 522, 527 (2003) (internal citation omitted). In 1991, in *Coleman v. Thompson*, 501 U.S. 722, 731-32, 750 (1991), this Court held in the federal habeas context that the exhaustion requirement necessitated compliance with state procedural rules, including filing deadlines. Accordingly, as Judge Rosen reasoned in his partial dissent in *Thomas v. Woolum*, in light of this precedent, "[i]t seems reasonable to assume . . . that Congress meant for prisoners to 'exhaust' their remedies under § 1997e(a) in precisely the same way that they must 'exhaust' their remedies under 28 U.S.C. § 2254(b)(1)(A)." *Thomas v. Woolum*, 337 F.3d 720, 756 (6th Cir. 2003) (Rosen, J., dissenting in part and concurring in judgment).

In addition to the plain language of the statute, the history of § 1997e(a) further confirms that Congress intended for prisoners to do much more than simply resort

to state remedies at some point before initiating a federal action. Like the ADEA and Title VII, which require initiation of state proceedings that merely results in the deferral of a subsequent federal action, *see Oscar Mayer*, 441 U.S. at 756 (holding that "prior resort" to state proceedings "is required under § 14(b), just as under § 706(c)"), the former version of § 1997e(a) also contained the semblance of a "prior resort" requirement. Although the earlier statute employed the term "exhaustion," it nonetheless expressly limited a district court's ability to impose that requirement to a period "not to exceed ninety days," for which time the inmate's federal case was merely "continue[ed]." 42 U.S.C. § 1997e(a) (1994). But in revising § 1997e(a) through the PLRA, Congress jettisoned the ninety-day continuance language and replaced it with an unqualified exhaustion mandate. Therefore, it is evident that Congress intended to bar a federal action for prisoners who had not first exhausted the State's available administrative process.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: December 29, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California

MANUEL M. MADEIROS
State Solicitor General

JAMES M. HUMES
Chief Assistant Attorney General

FRANCES T. GRUNDER
Senior Assistant Attorney General

THOMAS S. PATTERSON
Supervising Deputy Attorney
General

JENNIFER G. PERKELL
Deputy Attorney General
Counsel of Record

Attorneys for Petitioners

Supreme Court, U.S.
FILED
FEB 2 - 2006
OFFICE OF THE CLERK

No. 05-416

IN THE

Supreme Court of the United States

JEANNE S. WOODFORD
AND ANTHONY P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT VIET MIKE NGO

DONALD B. AYER
THOMAS J. DAVIS
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

MEIR FEDER
(Counsel of Record)
CHARLES R.A. MORSE
KATE BUSHMAN
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

Counsel for Respondent

February 2, 2006

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20001

QUESTION PRESENTED

Where a prisoner has pursued his available administrative remedies but his grievance has been rejected by prison officials on procedural grounds, such that no remedies remain available, is the Prison Litigation Reform Act's requirement that the prisoner delay bringing an action "until such administrative remedies as are available are exhausted," 42 U.S.C. § 1997e(a), satisfied?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. Factual Background 1

B. The Exhaustion Requirement Of The PLRA 2

C. Proceedings Below 3

SUMMARY OF ARGUMENT 5

ARGUMENT 10

I. THE PLAIN LANGUAGE AND CONTEXT OF § 1997e REQUIRE SIMPLE EXHAUSTION 10

A. The Plain Text Of § 1997e(a) And A Related Provision Require Simple Exhaustion 10

1. The Text Of § 1997e(a) Requires Simple Exhaustion 10

2. § 1997e(c)(2) Confirms That Congress Required Simple Exhaustion And Did Not Contemplate Procedural Defaults 13

B. Petitioners' Interpretation Is Unsupported By Any Textual Argument And Requires Supplementing The Language Of The Statute 15

TABLE OF CONTENTS
(continued)

Page

C. Nearly Identical Language In The Habeas Corpus Statute Has Been Definitively Interpreted As Requiring Only Simple Exhaustion 16

D. The Administrative Exhaustion Cases On Which The United States Relies Do Not Import Any Different Meaning Of "Exhausted" Into § 1997e 23

E. Important Principles Of Construction Require Interpreting § 1997e As Requiring Simple Exhaustion 28

1. § 1997e Cannot Be Construed To Give State Authorities The Ability To Defeat Federal Claims By Manipulating Procedural Rules 28

2. Multiple Other Principles Of Statutory Construction Require The Same Result 32

II. THE LEGISLATIVE HISTORY OF THE PLRA PROVIDES NO SUPPORT FOR REQUIRING ANYTHING MORE THAN SIMPLE EXHAUSTION 34

III. PETITIONERS' PUBLIC POLICY ARGUMENTS OFFER NO SUPPORT FOR REQUIRING ANYTHING MORE THAN SIMPLE EXHAUSTION 39

TABLE OF CONTENTS
(continued)

Page

A. Petitioners' Arguments About The Purported Benefits Of A Procedural Default Rule Should Be Directed To Congress, Not This Court 39

B. Petitioners Cannot Reasonably Contend That The Statutory Purpose Is To Reduce Lawsuits At All Costs 40

C. Even If Petitioners Were Correct About The Statute's Purpose, Their Claim That § 1997e Is "Meaningless" Without Procedural Default Is Incorrect 42

IV. PETITIONERS' REQUEST THAT THIS COURT CRAFT A FORFEITURE RULE BY "ANALOGY" TO HABEAS CASES IS MISCONCEIVED 46

CONCLUSION 50

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Booth v. Churner, 532 U.S. 731 (2001) 23, 34, 34, 44
Branch v. Smith, 538 U.S. 254 (2003) 33
Burnett v. Grattan, 468 U.S. 42 (1984) 29, 30
Castille v. Peoples, 489 U.S. 346 (1989) 19
Central Va. Committee College v. Katz,
No. 04-885, slip op. (U.S. Jan. 23, 2006) 19
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 48
Coleman v. Thompson, 501 U.S. 722 (1991) 18, 19, 21, 25
Colorado River Water Conservation District
v. United States, 424 U.S. 800 (1976) 47, 48
Connecticut National Bank v. Germain,
503 U.S. 249 (1992) 10
Daniels v. Allen, 344 U.S. 443 (1953) 47
Dodd v. United States, 125 S. Ct. 2478 (2005) 10, 40
Dretke v. Haley, 541 U.S. 386 (2004) 47
Duncan v. Walker, 533 U.S. 167 (2001) 36
EEOC v. Commercial Office Products Co.,
486 U.S. 107 (1988) ..... *passim*
Edelman v. Lynchburg College, 535 U.S. 106
(2002) 32
Edwards v. Carpenter, 529 U.S. 446 (2000) 20, 21, 49
Engle v. Isaac, 456 U.S. 107 (1982) 17
Fay v. Noia, 372 U.S. 391 (1963) 18, 19, 45, 47
Felder v. Casey, 487 U.S. 131 (1988) ..... *passim*
Franklin v. Johnson, 290 F.3d 1223
(9th Cir. 2002) 48
Gray v. Netherland, 518 U.S. 152 (1996) 7, 17, 18, 19
Heck v. Humphrey, 512 U.S. 477 (1994) 25
Hudson v. McMillian, 503 U.S. 1 (1992) 33
Lambrix v. Singletary, 520 U.S. 518 (1997) 49
Lamie v. United States Trustee,
540 U.S. 526 (2004) 10, 15, 40, 48

TABLE OF AUTHORITIES
(continued)

Page

Lee v. Kemna, 534 U.S. 362 (2002) 48
Love v. Pullman Co., 404 U.S. 522 (1972) 32
Martinez v. California, 444 U.S. 277 (1980) 29
McCarthy v. Bronson, 500 U.S. 136 (1991) 20, 24, 25
McCarthy v. Madigan, 503 U.S. 140 (1992) ..... *passim*
McKart v. United States, 395 U.S. 185 (1969) 26
Minix v. Pazera, No. 1:04 CV 447 RM,
2005 WL 1799538 (N.D. Ind. July 27, 2005) 33
Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 32
O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 20, 21
Oscar Mayer & Co. v. Evans,
441 U.S. 750 (1979) ..... *passim*
Patsy v. Board of Regents,
457 U.S. 496 (1982) 3, 26, 33, 38
Porter v. Nussle, 534 U.S. 516 (2002) 3, 41, 43, 44
Pozo v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002) 42
Preiser v. Rodriguez, 411 U.S. 475 (1973) 49
Riccardo v. Rausch, 375 F.3d 521 (7th Cir. 2004),
cert. denied, 125 S. Ct. 1589 (2005) 32
Robertson v. Wegmann, 436 U.S. 584 (1978) 45
Rodriguez v. United States, 480 U.S. 522 (1987) 41, 42
Ex parte Royall, 117 U.S. 241 (1886) 17
Sims v. Apfel, 530 U.S. 103 (2000) 24, 27
Slack v. McDaniel, 529 U.S. 473 (2000) 32
Strong v. David, 297 F.3d 646 (7th Cir. 2002) 31
Teague v. Lane, 489 U.S. 288 (1989) 19
Turner v. Safley, 482 U.S. 78 (1987) 33
United States Department of Justice v. Landano,
508 U.S. 165 (1993) 10, 40, 48
United States v. Goldenberg, 168 U.S. 95 (1897) 16, 40
United States v. L.A. Tucker Truck Lines, Inc.,
344 U.S. 33 (1952) 24
United States v. Vonn, 535 U.S. 55 (2002) 33

TABLE OF AUTHORITIES
(continued)

Page

United States v. Wells, 519 U.S. 482 (1997) 16, 19, 22
Wainwright v. Sykes, 433 U.S. 72 (1977) ..... *passim*
Walker v. Maschner, 270 F.3d 573 (8th Cir. 2001) 42
Warner-Jenkinson Co. v. Hilton Davis Chemical Co., 520 U.S. 17 (1997) 40
West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991) 40
Wilson v. Garcia, 471 U.S. 261 (1985) 7, 28, 30, 32
Withrow v. Williams, 507 U.S. 680 (1993) 47
Yick Wo v. Hopkins, 118 U.S. 356 (1886) 33

FEDERAL STATUTES

Antiterrorism & Effective Death Penalty Act ("AEDPA") 13
Civil Rights of Institutionalized Persons Act ("CRIPA"), Pub. L. No. 96-247, 94 Stat. 349 ..... *passim*
Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e ..... *passim*
8 U.S.C. § 1252(d)(1) 27
28 U.S.C. § 636(b)(1)(B) 25
28 U.S.C. § 1915(b)(1)-(2) 36
28 U.S.C. § 1915(g) 36
28 U.S.C. § 1915A(b)(1)-(2) 37
28 U.S.C. § 2241(a) 47
28 U.S.C. § 2243 47
28 U.S.C. § 2244(d)(2) 6, 13
28 U.S.C. § 2254(b) ..... *passim*
42 U.S.C. § 1983 ..... *passim*
42 U.S.C. § 2000e-5(e)(1) 25
45 U.S.C. § 355(f) 27, 28

TABLE OF AUTHORITIES
(continued)

Page

STATE STATUTES

CAL. CODE REGS. tit. 15, § 3084.3(c) 43
CAL. CODE REGS. tit. 15, § 3084.6(c) 2
ILL. ADMIN. CODE tit. 20, § 504.810(b) (2006) 31
26 ILL. REG. 18065, 2002 WL 31898262,
at § 504.810(b) (Dec. 27, 2002) 31

LEGISLATIVE HISTORY

141 Cong. Rec. S7498-01 (daily ed. May 25, 1995) 35, 37
141 Cong. Rec. S14611 (daily ed. Sept. 29, 1995) 3, 36, 41
141 Cong. Rec. H14078-02 (daily ed. Dec. 6, 1995) 35, 38
141 Cong. Rec. S18127-03 (daily ed. Dec. 7, 1995) 35, 37
142 Cong. Rec. S2219-03 (daily ed. Mar. 18, 1996) 36
H.R. Rep. No. 104-2468, § 2 (1995) 35, 44
H.R. Rep. No. 104-3019, tit. VIII (1996) 3

MISCELLANEOUS

R. FALLON, D. MELTZER, & D. SHAPIRO, THE FEDERAL
COURTS AND THE FEDERAL SYSTEM (5th ed. 2003) 22
Kermit Roosevelt III, Exhaustion Under The Prison
Litigation Reform Act: The Consequence of
Procedural Error, 52 EMORY L.J. 1771 (2003) 42

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1997e(a) provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

42 U.S.C. § 1997e(c)(2) provides: "In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies."

STATEMENT

This case addresses whether prison officials' rejection of a prisoner's grievance on procedural grounds permanently bars the prisoner's constitutional claims from federal court under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C, § 1997e, which prevents prisoners from filing suit until administrative remedies "are exhausted." The United States Court of Appeals for the Ninth Circuit (Pregerson and Kozinski, JJ., and Rhoades, D.J.) held that the PLRA does not create any such procedural default sanction for procedural missteps in a prison or jail grievance system. Petitioners seek a reversal of that ruling.

A. Factual Background

On October 26, 2000, respondent Viet Mike Ngo, an inmate at San Quentin State Prison, was placed in administrative segregation as punishment for alleged "inappropriate activity" with Catholic volunteer priests. Pet. App. 2, J.A. 12. Ngo was not issued any disciplinary report, and was never found guilty of any rules violation. J.A. 4, 13.

On December 23, 2000, Ngo was released from administrative segregation, but petitioner Kane, the Chief Deputy Warden, with the knowledge and approval of

petitioner Woodford, the Warden, prohibited him from communicating with a particular volunteer in the San Quentin Catholic Chapel and from participating in "Special Programs." As a result, Ngo was restricted from participating in Catholic observances such as the Sacrament of Confession, Holy Week services, and Bible study, as well as educational and volunteer activities. *Id.* at 4-5, 8. The Board of Prison Terms has deemed participation in such programs critical or mandatory for parole eligibility. *Id.* at 10.

After trying and failing to have petitioner Kane remove the restrictions, on June 18, 2001, Ngo submitted a formal grievance to the prison Appeals Coordinator challenging this ongoing disciplinary action. The Appeals Coordinator refused to accept the appeal for filing on the ground that Ngo had not submitted it within the time period allowed by California prison regulations, which is "within 15 working days of the event or decision being appealed," CAL. CODE REGS. tit. 15, § 3084.6(c). See J.A. 25. The form on which the decision was recorded noted that the decision could not be appealed. *Id.* at 26. Ngo submitted a second filing on June 25, 2001, arguing that his appeal was timely because the continuing denial of access to special programs was "an ongoing action." *Id.* at 34. The Coordinator rejected the filing on the same grounds, again on a form indicating that Ngo could not appeal the decision. *Id.* at 32-33.

B. The Exhaustion Requirement Of The PLRA

The predecessor of the current exhaustion provision contained in 42 U.S.C. § 1997e was enacted in 1980 as part of the Civil Rights of Institutionalized Persons Act ("CRIPA"), Pub. L. No. 96-247, 94 Stat. 349. Although exhaustion is not generally required in suits under 42 U.S.C. § 1983, CRIPA gave district courts discretion to require exhaustion in § 1983 suits by state prisoners when the administrative remedies satisfied certain federal standards. In

such cases, the court was authorized to stay the federal litigation for a limited period to permit exhaustion. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 511 (1982).

The legislation that became the PLRA was first introduced in 1995, and enacted in 1996 as part of an appropriations bill, H.R. 3019, 104th Cong., tit. VIII (1996). Supporters of the Act argued that it would help to discourage frivolous litigation by inmates, while not "prevent[ing] inmates from raising legitimate claims." 141 Cong. Rec. S14611, S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch). The PLRA amended the CRIPA exhaustion provision by making it mandatory rather than discretionary; eliminating the language requiring minimum federal standards for grievance procedures; and applying it to all suits under federal law by state and federal prisoners, where CRIPA had only been applicable to § 1983 actions by state prisoners. See generally *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

C. Proceedings Below

On July 11, 2001, Ngo filed a complaint in the United States District Court for the Northern District of California under § 1983, seeking injunctive relief and damages and alleging that petitioners' conduct violated his First Amendment rights to free exercise of religion and free speech; denied him due process; and defamed him. J.A. 2-14. Ngo further alleged that he had exhausted all available administrative grievance procedures, noting that he had submitted two appeals that were rejected. *Id.* at 15-19. On motion by petitioners, the District Court granted the defendants' motion to dismiss for failure to exhaust administrative remedies. Pet. App. 25.

The Ninth Circuit reversed, rejecting petitioners' argument that Ngo's allegedly untimely filing amounted to a failure to exhaust under the PLRA. The court reasoned that petitioners' argument "confuses the doctrines of exhaustion

and procedural default," because exhaustion is a timing doctrine that merely "bars a remedy in federal court if one is still available in the state's administrative system," whereas procedural default permanently bars claims that are procedurally barred in the state system. *Id.* at 9. The court concluded that the PLRA contains only an exhaustion requirement, not a procedural default rule.

In doing so, the Ninth Circuit emphasized that nothing in the statute's language "mentions procedural default or indicates an intent to bar suits by prisoners who fail to meet administrative time requirements." *Id.* at 15. The court also cited authority holding that "long-established differences between the exhaustion requirement and the procedural default doctrine preclude any conclusion that Congress implicitly intended to reach one by a statutory reference to the other." *Id.* at 18-19 (internal quotation marks omitted).

The court further noted that engrafting a procedural default rule onto the PLRA's exhaustion requirement "would effectively shrink to fifteen working days"—the limit imposed by the prison grievance system—the limitations period in § 1983 actions by California prisoners. *Id.* at 20 & n.4. Moreover, allowing procedural defects to bar potentially meritorious claims would give prison administrators "an incentive to fashion grievance procedures which prevent or even defeat" such claims. *Id.* at 21.

The Ninth Circuit rejected an analogy to the procedural default bar recognized in habeas corpus cases, noting that the habeas procedural default rule "has its origins in the adequate and independent state ground doctrine," *id.* at 9, and in the fact that a habeas petition is a collateral attack on a state court judgment that may rest on such a ground. In that context, enforcing state procedural requirements is essential, because "the state criminal process should be the 'main event' rather than a 'tryout on the road' to a dispositive

federal habeas hearing." *Id.* at 14 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)). Prisoners' § 1983 suits, in contrast, "do not collaterally attack a prison grievance proceeding," and it is the federal suit, not the grievance proceeding, that is the main event. Pet. App. 14. The court ultimately determined that the PLRA requirement that plaintiffs exhaust prison administrative remedies is more similar to the Title VII and ADEA administrative schemes—where the Supreme Court has declined to "implant[]" a procedural default rule, *see, e.g., EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988)—than it is to habeas exhaustion. Pet. App. 18-20.

Finally, the Ninth Circuit rejected the policy argument that the absence of a procedural default rule would defeat the exhaustion requirement's purpose of allowing corrections officials to "take 'corrective action . . . [that] might improve prison administration and satisfy the inmate.'" *Id.* at 16 (ellipsis and brackets in original) (quoting *Porter v. Nussle*, 534 U.S. at 524-25). Prisoners are unlikely to intentionally default their grievances, because the grievance process represents "the fastest route to a remedy." Pet. App. 16. And, in any case, "the inmate must still submit his untimely grievance" in order to exhaust, and that submission satisfies the PLRA goal of "allowing prison officials first crack at resolving prisoners' grievances," should they choose to hear the case on the merits. *Id.* at 17.

SUMMARY OF ARGUMENT

The plain text and structure of § 1997e impose a requirement of exhaustion *simpliciter*, which means that a prisoner's administrative remedies must be "exhausted" in the simple sense that they are no longer available. Petitioners contend that § 1997e requires more than exhaustion *simpliciter, i.e.*, procedurally faultless exhaustion, such that the prisoner's grievance is addressed on the merits rather than rejected by prison officials because of procedural

missteps.[1] Where a grievance is rejected on procedural grounds, petitioners contend that § 1997e requires that it be considered procedurally defaulted.

Several aspects of the plain text of § 1997e compel the conclusion that it requires only simple exhaustion. *First*, the statute's use of the temporal word "until" establishes that § 1997e(a) embodies a *timing* requirement, postponing suit *until* administrative remedies are unavailable. The word is not consistent with "merits" exhaustion, under which the question is *not* one of timing; the claim of a prisoner whose grievance is rejected on procedural grounds is not *postponed*; it is forfeited. *Second*, § 1997e(a)'s use of the present tense—asking whether administrative remedies "*are exhausted*" (emphasis added)—requires a focus on whether remedies are *presently* available. This language cannot be squared with petitioners' rule, which requires a backward-looking focus on what remedies *were* available and whether they became unavailable through review on the merits or through procedural errors. *Third*, the failure to expressly require more than simple exhaustion in § 1997e(a) is telling, given that Congress contemporaneously passed another statute that turned on a prisoner's invocation of state remedies, and *did* specify that they had to be invoked "properly," by requiring "a *properly filed* application" for state remedies, 28 U.S.C. § 2244(d)(2) (emphasis added). Congress could easily have added similar language here. Finally, a closely related provision, § 1997e(c)(2)—which gives district courts the option of dismissing certain suits on

---

[1] For ease of reference, this brief will sometimes refer to exhaustion *simpliciter* as "simple" exhaustion, and to the position of petitioners as "merits" exhaustion or "procedurally faultless" exhaustion.

the merits "without first requiring the exhaustion of administrative remedies"—makes clear that Congress thought that in typical cases of non-exhaustion the prisoner *could* return to the grievance system to exhaust, and would not procedurally default his claims.

Respondent's interpretation of § 1997e is also compelled by the well-settled interpretation of nearly identical language in the habeas corpus exhaustion statute, 28 U.S.C. § 2254(b), as requiring exhaustion *simpliciter*. The exhaustion requirement under § 2254(b) is a *timing* requirement, and state remedies are "exhausted" whenever there are no such remedies *still* available, even if remedies have become unavailable only because they were procedurally forfeited. *E.g., Gray v. Netherland*, 518 U.S. 152, 161 (1996). Because of the established habeas corpus distinction between exhaustion and procedural default, Congress' decision in the PLRA to require only exhaustion makes clear it meant just that: exhaustion, not procedural default. The United States' attempt to portray habeas exhaustion as requiring procedurally faultless exhaustion is inconsistent with decades of case law and is contradicted by the very cases on which the United States relies. And the administrative exhaustion doctrines the United States cites for the same proposition are inapposite.

Important principles of statutory construction also support respondent's position. In particular, this Court has refused to construe statutes in a fashion that gives state authorities the opportunity to defeat § 1983 claims by controlling limitations periods or other procedural rules. *E.g., Wilson v. Garcia*, 471 U.S. 261, 279 (1985). Here, construing § 1997e as including a procedural default sanction would effectively turn the § 1983 limitations period for prisoners into a matter of days—in a number of states, as few as two or three days. It would also give jail and prison officials the opportunity and incentive to preclude § 1983 suits by straining to reject

prison grievances on procedural grounds. Other statutory construction principles are also applicable: This Court has found forfeiture of claims through procedural errors inappropriate where claimants proceed *pro se*; reading a procedural default rule into § 1997e would operate as an implied partial repeal of § 1983; and Congress' determination that prisoners must exhaust all remedies without regard to their fairness suggests a congressional belief that procedural errors would not result in defaults. Had Congress believed the contrary, its elimination of fairness standards could be explained only by implausibly attributing to it the intent to create an uncommonly harsh rule.

The history of § 1997e also provides no support for petitioners. Petitioners cannot point to even a single statement by any Senator or Representative indicating that he or she intended or expected a procedural default rule. Petitioners and the United States attempt to overcome this resounding silence through a complicated argument that imputes intent to Congress based on an alleged assumption in *McCarthy v. Madigan*, 503 U.S. 140 (1992), that any exhaustion rule would inherently include a procedural default component. However, *McCarthy* made no such assumption, and, in any event, the only reference to *McCarthy* in the legislative history had nothing to do with any purported procedural default rule.

Petitioners' public policy argument that the purposes of the PLRA exhaustion requirement require a procedural default rule is also unavailing. In the absence of affirmative evidence that Congress created such a rule, petitioners' arguments in favor of creating one should be directed to Congress, not this Court. Moreóver, the argument is improperly premised on the notion that Congress' purpose in enacting the PLRA was to reduce inmate litigation at all costs, a portrayal of congressional intent that is oversimplified and inaccurate.

In addition, the overblown claim that interpreting § 1997e as requiring simple exhaustion would make the statute "meaningless" is demonstrably incorrect. The Ninth Circuit did *not* hold that prisoners can satisfy § 1997e merely by passively allowing filing deadlines to pass. Rather, because grievance systems typically allow discretion to excuse late filings, "the inmate must still submit his untimely grievance" in order to exhaust. Pet. App. 17. Accordingly, there are numerous ways the exhaustion requirement is meaningful even without procedural default: At a minimum, the requirement means an aggrieved inmate cannot proceed immediately to court, but rather must wait at least until the end of the filing period; in addition, the inmate cannot go to federal court without at least attempting to submit an untimely claim, and prison officials, if they desire, can address it on the merits, and perhaps satisfy the prisoner or convince him the claim is frivolous; and even if prison officials decline to hear the grievance, the effort of filing the grievance and proceeding through the system may dissuade the prisoner from filing suit.

Moreover, the notion that it is inherently irrational to require exhaustion without procedural default is contradicted by this Court's own case law prior to *Wainwright v. Sykes*, 433 U.S. 72 (1977), as well as by other statutory schemes in which Congress has required invocation of administrative remedies but has not accompanied that with a procedural default sanction.

Finally, petitioners' invitation to this Court to create a judge-made PLRA procedural default doctrine by "analogy" to habeas cannot be accepted. The Court's authority to create doctrines like procedural default in habeas cases stems from its broad equitable discretion in such cases. The Court has no similar discretion here to supplement Congress' statutory scheme. Moreover, even if there were such discretion, the

fundamental bases for the habeas procedural default doctrine are entirely absent here.

ARGUMENT

POINT I

THE PLAIN LANGUAGE AND CONTEXT OF § 1997e REQUIRE SIMPLE EXHAUSTION

A. The Plain Text Of § 1997e(a) And A Related Provision Require Simple Exhaustion

1. The Text Of § 1997e(a) Requires Simple Exhaustion

This statutory interpretation case is governed by the "cardinal canon" that presumes "that a legislature says in a statute what it means and means in a statute what it says there," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), and the concomitant recognition that when a provision is *not* fairly contained in statutory language, the Court will not, in pursuit of the alleged policy of the statute, "engraft" it. *United States Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993); see also *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) (Court will not "read an absent word into the statute"); *Dodd v. United States*, 125 S. Ct. 2478, 2483 (2005) (Court will not "rewrite the statute that Congress has enacted").

Here, the plain text of § 1997e(a) states: "No action shall be brought . . . *until such administrative remedies as are available are exhausted.*" (Emphasis added). The natural reading of this language is that it imposes only a *timing* requirement—postponing suit until no administrative remedies remain—rather than a requirement that the

remedies be rendered unavailable in any particular manner.[2] In particular, Congress' choice of the phrase "[n]o action shall be brought . . . *until*" remedies have been exhausted (instead of saying no action shall be brought "*unless*" remedies have been exhausted) is significant. The use of the temporal word "until," meaning "before the time that," WEBSTER'S THIRD NEW INT'L DICTIONARY 2513 (1993), conveys a timing requirement: it assumes that the question to be answered is simply whether the prisoner can file suit now or must wait until later; if no remedies are available, he can file now, but if remedies *are* available, he cannot file "until" later, when they become unavailable.

By contrast, the meaning of "until" is *not* consistent with a rule requiring "merits" exhaustion (*i.e.*, review on the merits by the grievance system), under which the question is not one of *timing*—whether the plaintiff can file now or must wait until later—but whether he can ever file *at all*. Under that rule, a plaintiff whose grievance is rejected on procedural grounds (due to late filing or any other procedural rule jail or prison officials choose to enforce), has not merely *postponed* his suit "until" some later time; he has permanently lost his opportunity to exhaust that remedy, and forfeits his claim.[3]

---

[2] It is important to note that contrary to petitioners' suggestion, a simple exhaustion requirement does *not* mean a prisoner may simply wait for prison filing deadlines to pass and proceed directly to federal court. Even after the deadlines, a prisoner typically "must still submit his untimely grievance" in order to exhaust. Pet. App. 17. See *infra* Point III(C).

[3] To be sure, a postponement rather than a permanent bar is theoretically possible under a "merits" exhaustion regime, if a prisoner-litigant may return to the grievance system for resolution on the merits. In practice, however, the uniformly short deadlines of prison grievance systems,

The United States responds that saying "until" "encompasses the possibility that the time of exhaustion will never arrive." U.S. Br. 13. But the "merits" exhaustion rule the United States advocates is not a rule that exhaustion may "never arrive," which connotes indefinite postponement; it is a rule of forfeiture, under which suit is permanently barred once prison or jail officials reject the grievance on procedural grounds. If Congress contemplated the permanent default of improperly exhausted claims, its choice of a word connoting postponement rather than a permanent rejection is inexplicable.[4]

The simple exhaustion interpretation of § 1997e(a) is also compelled by the statute's use of the present tense—"until such administrative remedies as are available *are exhausted*." (Emphasis added.) This phrasing requires a focus on whether any administrative remedies are *presently* available, and the answer to that question cannot depend on what remedies were previously available, much less how they became unavailable. The language is patently *in*consistent with the position of petitioners and the United States, which requires a backward-looking analysis of "those administrative procedures that an inmate has a right to invoke *before* he has rendered those procedures obsolete by

---

see Brief for Amicus Curiae Jerome N. Frank Legal Services Organization of the Yale Law School (hereinafter "Jerome N. Frank Brief"), mean that any grievance filed after a federal claim is dismissed will be untimely.

[4] Notably, the state amici supporting petitioners, do not contest that the use of "until" is inconsistent with a procedural default rule. Instead, they forthrightly contend that the text should be ignored because of "the goals of § 1997e," and should be seen as "too slender a reed" on which to rely in interpreting the statute. Brief of New York, *et al.* ("States Br.") 18 n.8.

defaulting on them," Pet. Br. 14 (emphasis in original), and *how* they became unavailable.

Finally, what § 1997e(a) *fails* to say is highly significant. The text does not say that remedies must be "properly" exhausted by filing timely and procedurally compliant grievances; it does not say a prisoner must "exhaust by actually using all remedies that were at any point available"; and it nowhere mentions the concept of procedural default.

This omission of language limiting or modifying the word "exhausted" is particularly telling in light of how Congress dealt with a nearly identical issue in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which was signed into law just two days before the PLRA. In the AEDPA, addressing a tolling provision that, like PLRA exhaustion, turns on a prisoner's invocation of state remedies, Congress specifically limited the provision to "[t]he time during which a *properly filed* application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2) (emphasis added). Congress' failure to include similar language in § 1997e strongly suggests that it intended no similar limitation to "proper" or procedurally faultless invocation of state remedies.

2. § 1997e(c)(2) Confirms That Congress Required Simple Exhaustion And Did Not Contemplate Procedural Defaults

In addition to the text of § 1997e(a) itself, a closely related provision, § 1997e(c)(2), expresses Congress' understanding that inmates who failed to exhaust would *not* forfeit their claims, but rather would routinely return to the prison grievance system to exhaust any remaining remedies, even though such filings would inevitably be untimely.

Section 1997e(c)(2) gives district courts the authority to dismiss on the merits, "without first requiring the exhaustion of administrative remedies," certain claims that are both

unexhausted and meritless. The necessary premise of this provision is that dismissing on the merits without first requiring exhaustion will save courts time and resources. Dismissing on the merits under this provision, however, will save time and resources only if in the typical case (1) dismissal for non-exhaustion permits an inmate to return to the prison grievance system to exhaust his remedies, even if his grievance will be untimely, and (2) the inmate may then return to federal court. If procedural missteps result in a *forfeiture* of the inmate's claim that cannot be cured by returning to the grievance system, there would be no advantage in dismissing on the merits rather than requiring exhaustion—in either case, the suit could be definitively dismissed immediately.

Indeed, it is impossible to see what "first requiring the exhaustion of administrative remedies" can mean, unless an inmate typically can still exhaust by returning to the prison grievance system at any time. If missing a prison filing deadline constitutes failure to exhaust, the concept of a court "first requiring exhaustion" would make little sense. A prisoner whose grievance is rejected for untimeliness can hardly return to the grievance system and make the grievance timely.

In theory, petitioners could argue that Congress intended § 1997e(c)(2) to apply to a sub-category of cases in which a prisoner-litigant has not filed a grievance but can still return to the grievance system without violating timeliness requirements or other rules. Such a category, however, would be an imaginary one, given the uniformly short filing deadlines that prevail in grievance systems; any grievance would almost certainly be time-barred. See U.S. Br. 29 (most allow "14 to 30 days"); see generally Jerome N. Frank Brief (listing numerous even shorter deadlines).

B. Petitioners' Interpretation Is Unsupported By Any Textual Argument And Requires Supplementing The Language Of The Statute

Both petitioners and the United States claim to rely on the text of § 1997e, but they cannot even agree on what language purportedly embodies their proposed procedural default rule. Petitioners purport to rely on the word "available," but base their reading on the claim that the exhaustion requirement would be "superfluous" without procedural default. Pet. Br. 14-15. This claim is both incorrect, see *infra* Point II(B), and *not* based on a reading of the text. The United States makes no plain language argument at all, tying its argument to the statutory language solely by means of the contention that the word "exhausted" allegedly has a specialized meaning, borrowed from other contexts, that connotes exhaustion on the merits. U.S. Br. 9-13.

In reality, the fundamental argument of each is not a textual one. Rather, they argue that, independent of the text, Congress must have silently *meant* to include a procedural default sanction, because the PLRA's purposes allegedly require it. Locating any such rule in the language of the statute, however, impermissibly requires reading additional words into the statutory text. Petitioners read the phrase "such remedies as are available" as "such remedies as were initially available," Pet. Br. 14-15, and even state plainly at one point that what they seek is "the reading of a procedural-default bar *into* § 1997e(a)." *Id.* at 26 (emphasis added). And the United States overtly argues that the statute should be read as if it included the word "properly" before the word "exhausted." U.S. Br. 9-10.

Adding words to the statutory language, however, is precisely what this Court has said it cannot do, because such supplementation of the text "would result 'not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.'" *Lamie*, 540 U.S. at 538 (quoting *Iselin v.*

United States, 270 U.S. 245, 251 (1926)) (alteration in original); see also *United States v. Goldenberg*, 168 U.S. 95, 103 (1897) ("No mere omission . . . which it may seem wise to have specifically provided for, justif[ies] any judicial addition to the language of the statute.").

In short, there is no plain language argument in support of a procedural default or "exhaustion on the merits" rule, and no argument that does not rely upon impermissibly supplementing the statutory text.

C. Nearly Identical Language In The Habeas Corpus Statute Has Been Definitively Interpreted As Requiring Only Simple Exhaustion

The established meaning of the term "exhausted" in prisoner litigation under the habeas corpus statute, 28 U.S.C. § 2254(b)(1)—and the fundamental distinction between exhaustion and procedural default in habeas proceedings—also compels reading § 1997e as requiring only simple exhaustion. Because of the established distinction between exhaustion and procedural default, it is clear that when Congress expressly included an exhaustion requirement in the PLRA, but opted not to create an accompanying procedural default provision, it meant just that—exhaustion, not procedural default. See *United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents.").

Both petitioners and the United States recognize that the operative language of the PLRA "is essentially identical to" the language of the habeas corpus exhaustion requirement,[5] U.S. Br.

---

[5] 28 U.S.C. § 2254(b)(1)(A) states, in pertinent part, that a State prisoner's habeas application "shall not be granted unless it appears that . . .

13; see Pet. Br. 26, and it is well-established that exhaustion under § 2254(b) does *not* require that remedies be exhausted through review on the merits. To the contrary, under § 2254(b), state remedies are "exhausted" whenever there are no such remedies *still* available, even if remedies have become unavailable only because they were procedurally forfeited. See, *e.g.*, *Gray v. Netherland*, 518 U.S. 152, 161 (1996) (claims are unexhausted only when there are state "remedies available at the time of the federal petition") (internal quotation marks omitted); *Engle v. Isaac*, 456 U.S. 107, 125-26 n.28 (1982) (where state remedies unavailable because claim was not raised on direct appeal, habeas petitioners "have exhausted their state remedies with respect to th[at] claim"). The exhaustion requirement, in short, is a *timing* requirement that prevents federal court intervention until there are no longer any state court remedies remaining.[6] So long as such remedies are unavailable, it is irrelevant, for exhaustion purposes, *how* they became unavailable.

To be sure, the unavailability of a claim through failure to raise it properly in state court is not without consequences in habeas; at least since *Wainwright v. Sykes*, 433 U.S. 72 (1977), such forfeited claims, though "exhausted" under § 2254(b), have in most cases been barred from federal court by the doctrine of

---

the applicant has exhausted the remedies available in the courts of the State." Notably, to the extent there are differences between the two statutes they favor respondent's position here: § 2254 imposes a requirement of simple exhaustion even with the word "unless" rather than "until," and without § 1997e's present-tense phrase "are exhausted."

[6] In fact, the exhaustion doctrine now codified in 28 U.S.C. § 2254 originated in a case in which the habeas applicant sought to have the federal courts intervene even before his state criminal trial occurred. *Ex parte Royall*, 117 U.S. 241 (1886).

procedural default. That doctrine, however, is a judge-made equitable rule that is entirely distinct from § 2254(b)'s exhaustion requirement.[7] See *id.* at 80-81 & n.7. Indeed, this Court has consistently held that when a claim has been procedurally forfeited (and remedies thereby rendered unavailable), it necessarily *is* exhausted under § 2254(b). See, *e.g.*, *Gray*, 518 U.S. at 161 (claim is exhausted "'if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law.'") (quoting *Castille v. Peoples*, 489 U.S. 346, 351 (1989)) (alteration in original).

This Court has specifically rejected the argument that the language of § 2254(b)—which, again, is nearly identical to the language of § 1997e(a)—can be read to bar, as unexhausted, claims that were procedurally forfeited in state court. In *Fay v. Noia*, 372 U.S. 391 (1963) ("*Noia*"), the Court expressly rebuffed the "contention that 28 U.S.C. § 2254 embodies a doctrine of forfeitures and cuts off relief when there has been a failure to exhaust state remedies no longer available at the time habeas is sought," finding it "refuted by the language of the statute and its history." *Id.* at 434. The Court further noted that the contention it rejected was "in the teeth of the language of § 2254," and held that the statute applies only "to failure to exhaust state remedies *still open* to the habeas applicant at the time he files his application in federal court." *Id.* at 435 (emphasis added).

---

[7] Indeed, prior to *Sykes*, the exhaustion requirement was *not* accompanied by a rule barring claims forfeited in state court. Under the regime of *Fay v. Noia*, 372 U.S. 391 (1963), the petitioner's forfeiture of his claims in state court exhausted his remedies, but a habeas petition was not barred by the doctrine of procedural default unless the petitioner had "deliberately bypassed" state remedies. *Id.* at 438.

Although *Noia*'s best-known holding (limiting the procedural default doctrine to cases of "deliberate bypass") has been overruled, see, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), *Noia*'s interpretation of § 2254(b)—that a state remedy no longer available because it was forfeited *is* "exhausted"—continues to be the law. Indeed, even *Coleman*, which formally overruled *Noia*'s procedural default holding, continued to make clear that "[a] habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Id.* at 732. Numerous other cases are to the same effect. See *Gray*, 518 U.S. at 161-62; *Isaac*, 456 U.S. at 125-26 n.28; *Castille*, 489 U.S. at 351 (claims are exhausted "if it is clear that [they] are now procedurally barred under Pennsylvania law"); *Teague v. Lane*, 489 U.S. 288, 298 (1989) (where "[i]t is clear that collateral relief would be unavailable to petitioner. . . . [he] has exhausted his state remedies under 28 U.S.C. § 2254(b)").

In short, it is firmly established that § 2254(b)'s requirement that a habeas applicant have "exhausted the remedies available" in state court does not require "merits" exhaustion. Rather, it requires only exhaustion *simpliciter*: *i.e.*, that there are no longer any state remedies available, for whatever reason. Thus, a remedy that becomes unavailable through a procedural forfeiture in state court has still been "exhausted" under § 2254(b). Because of this well-established distinction between exhaustion and procedural default, it is clear that when Congress enacted the nearly-identically-worded PLRA and required only exhaustion, it intended the requirement to mean just that: exhaustion, not procedural default. See, *e.g.*, *Cent. Va. Comm. Coll. v. Katz*, No. 04-885, slip op. at 4 n.3 (Jan. 23, 2006) (noting the "presumption that Congress was thoroughly familiar with contemporary law when it enacted" statute) (internal quotation marks omitted); *Wells*, 519 U.S. at 495.

Nonetheless, in the face of this well-settled meaning of "exhausted the remedies available" under § 2254(b), the United

States persists in claiming that the phrase *does* require procedurally faultless exhaustion, relying on three cases purportedly establishing that there has been "a 'merger of exhaustion with procedural default,'" such that a procedurally defaulted claim is considered unexhausted under § 2254(b). U.S. Br. 9-10, 12-13 (quoting Pet. App. 14, and citing *Edwards v. Carpenter*, 529 U.S. 446 (2000); *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); and *Coleman v. Thompson*, 501 U.S. 722)). However, although each of the cases emphasizes the value of the procedural default doctrine as an *adjunct* to the habeas exhaustion requirement—*e.g.*, *O'Sullivan*, 526 U.S. at 848 (doctrine "protect[s] the integrity of the federal exhaustion rule") (internal quotation marks omitted); *Carpenter*, 529 U.S. at 452 (referring to "inseparability" of the two)—they do nothing to question the clear distinction between the doctrines, or to change the long-standing rule that remedies are "exhausted" whenever they are unavailable.

As an initial matter, two of the three cases on which the United States relies *post-date* the enactment of the PLRA by at least three years, and therefore any new meaning they purportedly gave to the term "exhausted" cannot have been incorporated by Congress into the PLRA. See, *e.g.*, *McCarthy v. Bronson*, 500 U.S. 136, 140 (1991) (cases decided "well after the enactment of" the statute at issue not relevant to interpretation of phrase in the statute). And the third, *Coleman*, offers nothing to support any "merger" of exhaustion and procedural default.

More fundamentally, the United States misconceives the division of labor between exhaustion and procedural default in these cases. In particular, the fact that these cases deem the procedural default doctrine an important judicially-created *adjunct* to the

exhaustion requirement does not make procedural default a *part* of the exhaustion requirement, or change that requirement into an obligation to exhaust claims through review on the merits.[8] Indeed, the cases demonstrate exactly the opposite: that § 2254(b) continues to require only simple exhaustion, and that the question whether a petitioner complied with state procedures is only relevant to the separate doctrine of procedural default. *None* of the cases says that procedurally defaulted claims are not "exhausted"; to the contrary, the cases continue to make clear that procedurally defaulted claims necessarily *are* exhausted.[9]

In short, the distinction between exhaustion and procedural default continues to be straightforward and clear. As described by the leading federal courts treatise:

> [A] procedural default involves a failure to pursue opportunities to litigate in state court that once were but no longer are available. A failure

---

[8] Notably, the state amici admit that "[i]t is true that the federal habeas exhaustion requirement, taken alone, mandates only that a petitioner have no remaining state remedies 'available' when a habeas petition is filed." States Br. 18.

[9] See *Coleman*, 501 U.S. at 732 ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion . . . ."); *O'Sullivan*, 526 U.S. at 848 (distinguishing between "whether a prisoner has exhausted his state remedies" and "whether he has *properly* exhausted" them, and terming failure to do the latter "procedural[] default[]," not a failure to exhaust); *id.* ("We do not disagree" with dissent's detailed elaboration of the distinction between doctrines of exhaustion and procedural default); *Edwards*, 529 U.S. at 453 (prisoner whose claim is not addressed by state courts because procedurally defective "would have 'concededly exhausted his state remedies'") (quoting *O'Sullivan*, 526 U.S. at 854 (Stevens, J., dissenting)).

> to exhaust state remedies, by contrast, involves a failure to resort to opportunities to litigate in state court that *remain* available.

R. FALLON, D. MELTZER, AND D. SHAPIRO, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1300 (5th ed. 2003) (emphasis in original). Accordingly, when a claim is forfeited in state court and can no longer be asserted there, "there is no question" that the exhaustion requirement is satisfied. *Id.* at 1359.

The cases cited by the United States thus do nothing to shake the well-settled meaning of "exhausted" under § 2254(b) as requiring only that state remedies be unavailable—a meaning of which Congress was presumptively aware when it chose nearly identical language for the PLRA, see, *e.g.*, *Wells*, 519 U.S. at 495. At most, the cases might be cited to support a policy argument in favor of creating a *judge-made* procedural default doctrine as a *supplement* to what the PLRA itself requires, if this Court were free to create one.[10] But for purposes of interpreting what is required by the *text* of the PLRA, the cases merely reaffirm that the term "exhausted" refers only to the present unavailability of remedies, not to any requirement of "merits" exhaustion.

---

[10] As discussed in Point IV, *infra*, however, that policy argument is not a successful one: the courts' freedom to craft a procedural default doctrine in habeas derives from an equitable discretion unique to habeas that is not present here. Moreover, the reasons for creating that doctrine, which rest heavily on an analogy to the independent and adequate state ground doctrine, are inapplicable here.

D. The Administrative Exhaustion Cases On Which The United States Relies Do Not Import Any Different Meaning Of "Exhausted" Into § 1997e

The United States also seeks to import into § 1997e, from administrative exhaustion cases, a definition of "exhausted"—as meaning exhausted without procedural flaws—that is purportedly established in such cases. U.S. Br. 10-12. This contention, too, fails, for multiple reasons.[11]

First, such a definition would be inconsistent with the plain text of § 1997e. As discussed earlier, the plain language of § 1997e(a), the statute's focus on the present tense, its failure to express any limitation on the word "exhausted," and § 1997e(c)(2)'s indication that claims will *not* be defaulted, are all inconsistent with an understanding of the PLRA that defines "exhaustion" as procedurally faultless exhaustion. See *supra* Point I(A).

In addition, there are numerous reasons why the definition of "exhausted" in § 1997e is identical to its meaning in habeas exhaustion rather than to what the United States claims is a settled meaning in administrative exhaustion. *First*, the PLRA's exhaustion language "is essentially identical to" the language of the habeas corpus exhaustion

---

[11] It is worth noting at the outset that the effort to import administrative exhaustion concepts into § 1997e represents an about-face for the United States. In *Booth v. Churner*, 532 U.S. 731 (2001), the United States opposed importing administrative exhaustion's "futility" exception into § 1997e, arguing that Congress in the PLRA "clearly demonstrate[d] that it did not wish to incorporate traditional [administrative] exhaustion principles." Brief for United States at 16, *Booth v. Churner*, 532 U.S. 731 (2001) (No. 99-1964).

statute, U.S. Br. 13, and the United States cites no statute addressing administrative exhaustion that has such similar language.

Second, as discussed in the Brief for Amici Curiae Law Professors, administrative exhaustion cases requiring "proper" presentation to the agency follow not from an established meaning of "exhaustion," but from an ordinary waiver principle that applies when an agency is the primary adjudicator or decisionmaker, and the court proceeding is merely a *review* of that decision. The agency cannot be the primary decisionmaker (and the court cannot review its decision) if a claim or argument is not presented to the agency. Indeed, the United States recognizes that this waiver concept is at the heart of administrative exhaustion requirements. See U.S. Br. 10-11 (administrative exhaustion cases apply a "waiver principle"); see also *Sims v. Apfel*, 530 U.S. 103, 108-09 (2000) ("The basis for a judicially-imposed issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts.").

By contrast, in a § 1983 or *Bivens* claim, the jail or prison grievance system is in no sense a primary decisionmaker. As the United States recognizes, the federal suit proceeds *de novo*. U.S. Br. 14 n.6. Accordingly, the waiver rationale is not implicated, because no administrative decision is being *reviewed*. Likewise, the related concern with "toppl[ing] over administrative decisions" on the basis of a claim or argument not presented to the agency, *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952), cannot apply when no administrative decision is being reviewed, let alone "toppled over." See *McCarthy v. Bronson*, 500 U.S. at 142 ("[T]he fact that Congress may have used the [same] term . . . in a different sense in legislation having a different purpose cannot control our interpretation of the language in this Act that so clearly parallels our [prior] opinion.").

In this respect, too, the PLRA context is more like the habeas context, because in habeas the court, at least technically, "does not review a judgment, but the lawfulness of the petitioner's custody *simpliciter*." *Coleman*, 501 U.S. at 730.[12]

Notably, in cases where Congress has required litigants to resort first to administrative procedures but the agency is not given decisionmaking authority—*i.e.*, where the subsequent federal suit is *de novo* rather than a review of an administrative decision—this Court has held that the statutes did *not* require compliance with state timeliness requirements. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 759 (1979); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1988).[13]

Third, there is an inherent relationship between habeas cases and prisoner suits subject to the PLRA, both of which "provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials." *Heck v. Humphrey*, 512 U.S. 477, 480 (1994); see also *id.* at 481 ("potential overlap" between the two); *McCarthy v. Bronson*, 500 U.S. at 140 (habeas and § 1983 are "the two

---

[12] Of course, because the habeas petitioner "is in custody *pursuant* to a judgment," *id.* (emphasis in original), a habeas petition functions *like* an attack on a judgment, and the procedural default doctrine is based on this parallel. See *infra* Point IV. No similar analogy applies in PLRA cases, as the suit is in no sense a review of any prior decision. See *id.*

[13] The Title VII requirement of timely filing with the EEOC might be thought a counter-example, but in fact that requirement is based on express statutory language requiring that charges "shall be filed" within specific time limits. 42 U.S.C. § 2000e-5(e)(1).

primary categories of suits brought by prisoners"); 28 U.S.C. § 636(b)(1)(B) (applying same rule to both types of prisoner cases with respect to referral to magistrates).

Indeed, the PLRA was developed at the same time as the AEDPA, and one of the earliest versions of the PLRA exhaustion requirement was in section 103 of the proposed Violent Crime Control and Law Enforcement Improvement Act of 1995 (S. 3), which also included changes to habeas exhaustion (see section 508) that eventually became part of the AEDPA. It is unlikely that these two references to exhaustion in the same bill were intended to incorporate different definitions of exhaustion.

Fourth, the predecessor to the PLRA exhaustion requirement was the discretionary exhaustion requirement of CRIPA. The concept of exhaustion embodied in CRIPA was a habeas-style timing requirement that permitted prisoners to cure non-exhaustion, not a default-inducing requirement of procedurally faultless exhaustion. See generally Brief of American Civil Liberties Union, *et al.* (detailing timing focus of CRIPA). Indeed, under CRIPA, a district court could not even dismiss a case without prejudice on exhaustion grounds. See, *e.g.*, *Patsy v. Bd. of Regents*, 457 U.S. 496, 511 (1982). Although the PLRA broadened CRIPA's exhaustion requirement and made it mandatory rather than discretionary, there is no suggestion that the PLRA abandoned the concept of exhaustion as a habeas-like timing requirement.

In any event, even if it were an appropriate analogy, "administrative exhaustion" is not a monolithic doctrine applying a single exhaustion requirement or definition of "exhausted": rather, the application of the doctrine varies with the particular statutory language and scheme at issue. See, *e.g.*, *McKart v. United States*, 395 U.S. 185, 195 (1969) ("In Selective Service cases, exhaustion must be tailored to

fit the peculiarities of the administrative system Congress has created."); *McCarthy v. Madigan*, 503 U.S. at 144 ("Of 'paramount importance' to any exhaustion inquiry is congressional intent.") (quoting *Patsy*, 457 U.S. at 501). Accordingly, the doctrine does *not* ineluctably require forfeiture of claims that do not satisfy all timely filing and procedural requirements, particularly where, as here, the waiver principle is inapplicable because no agency decision is being reviewed. See *Oscar Mayer*, 441 U.S. at 759 (requirement to commence state agency proceedings before filing with EEOC did not require *timely* commencement); *Commercial Office Prods. Co.*, 486 U.S. at 124 (same).[14]

Nor can the United States cite any case in which this Court has held that a "merits" exhaustion requirement automatically follows from a statute's use of the word "exhaust" or its variants. The two statutes it cites, 45 U.S.C. § 355(f) (Railroad Retirement Board), and 8 U.S.C. §1252(d)(1) (appeal of order of removal), fit within the "review" paradigm, where what the United States calls the "waiver principle," U.S. Br. 11, applies without regard to whether the statute uses the word "exhausted." Indeed, even the Court of Appeals authority cited by the United States

---

[14] To be sure, the statutes at issue in these two cases did not use the word "exhaustion." However, administrative exhaustion requirements often stem from the use of words other than exhaustion. See, *e.g.*, *Apfel*, 530 U.S. at 106-07 (Social Security Act exhaustion rule stems from statutory phrase "final decision"). What was actually at issue in those cases—giving "state agencies a limited [and non-binding] opportunity to resolve problems . . . and thereby to make unnecessary, resort to federal relief," *Oscar Mayer*, 441 U.S. at 755—is far more similar to what § 1997e does than are exhaustion requirements that give binding decisionmaking authority to the administrative agency.

does not purport to be deriving a requirement of what the United States calls "proper" exhaustion from the word "exhausted," as opposed to the waiver principle or other statutory language.[15]

In sum, there is no basis for importing a "merits" exhaustion requirement from administrative exhaustion cases.

E. Important Principles Of Construction Require Interpreting § 1997e As Requiring Simple Exhaustion

1. § 1997e Cannot Be Construed To Give State Authorities The Ability To Defeat Federal Claims By Manipulating Procedural Rules

Reading an unwritten procedural default rule into § 1997e would be particularly inappropriate in light of this Court's long-standing principle that statutes should not be construed to give state authorities the ability to defeat federal civil rights claims by controlling statutes of limitations or procedural rules.

In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court determined that state personal injury limitations periods should be borrowed for § 1983 claims in significant part because selecting a less broadly-applicable period might lead to the period being "fixed [by states] in a way that would discriminate against federal claims, or be inconsistent with federal law." *Id.* at 279. By contrast, the states would be unlikely to manipulate a period applicable to all personal injury suits. *Id.*

---

[15] For example, 45 U.S.C. § 355(f) requires that remedies will "have been *availed of* and exhausted," *and* requires that the decision to be reviewed be a "final decision." (Emphasis added).

Similarly, in *Felder v. Casey*, 487 U.S. 131 (1988), the Court reiterated *Wilson*'s concern about giving states the ability to defeat § 1983 claims by controlling procedure, holding that a state could not apply a statute requiring notice within 120 days of the injury in any suit against a governmental entity or officer. *Id.* at 138. The Court objected to the brief "4-month window" given to claimants, and found that because the requirement applied only to "persons who wish to sue governmental defendants," it "discriminate[d] in a manner detrimental to the federal right." *Id.* at 146; see also, *e.g.*, *Burnett v. Grattan*, 468 U.S. 42, 50 (1984) (refusal to apply limitations periods too short to "take into account [the] practicalities that are involved in litigating federal civil rights claims"); cf. *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) (a "construction of [§ 1983] which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise") (internal quotation marks omitted).

In the present case, these concerns apply *a fortiori*. If an untimely grievance defaults a prisoner's federal claim, the grievance system's filing deadline—almost always substantially shorter than the "4-month window" this Court disapproved in *Felder*—effectively becomes a statute of limitations for the prisoner's federal claim. As the court below noted, this would have changed the limitations period applicable to respondent's claim from two years to 15 working days. Pet. App. 20 n.4. In numerous other states, the period would be shorter than one week, and in several the prisoner would be required to take action in as little as two or three days. See Jerome N. Frank Brief, App. at 1-5.[16]

---

[16] Cf. *Oscar Mayer*, 441 U.S. at 762 ("Congress could not have intended to consign federal lawsuits to the vagaries of diverse state limitations statutes, particularly since, in many States . . . the limitations peri-

Moreover, here, as in *Felder*, the filing deadlines apply specifically to cases against state officials and entities. And the potential for abuse is much greater here, because the deadlines and other procedural rules apply only to an unpopular and politically powerless group, not citizens at large; jail and prison officials have a strong incentive to reduce inmate litigation by setting unfair deadlines and procedural traps for the unwary litigant (see Pet. App. 21). Further, the rules are interpreted and applied, not by impartial state judges, but by jail and prison officials who may be motivated to protect themselves, co-workers, supervisors, or their institutions from potential liability by rejecting claims on procedural grounds, and who are subject to no realistic check on the fairness of their decisions.

The United States contends that this "concern has not been shown to be justified," because "[m]ost jurisdictions" allow the filing of claims within 14 to 30 days of the action being challenged," and because there allegedly has been no showing that prison administrators impose onerous procedural obstacles. U.S. Br. 29-30. This argument, however, misses the point. Under *Wilson* and *Felder*, this Court has construed statutes to avoid giving state officials the *opportunity* to use procedural requirements to defeat federal civil rights claims, and certainly has not required a showing that particular states have already taken advantage of the opportunity. See, *e.g.*, *Wilson*, 471 U.S. at 279.[17]

---

ods are considerably shorter than the 180-day period allowed grievants in nondeferral States.") (internal citation and quotation marks omitted).

[17] Moreover, the 14 to 30 day deadlines which the United States notes actually undermine the point: even those deadlines are far shorter than the four months found intolerable in *Felder*, and there are many other states with deadlines as short as two, three, or five days that cannot be used to trigger procedural defaults without defeating § 1983's purpose of

In addition, the assertion that officials have made no effort to eliminate prisoner claims on procedural grounds is simply inaccurate. This case itself arguably provides an example. Respondent's grievance challenged ongoing restrictions on his activities, yet the prison grievance coordinator rejected respondent's appeal on the ground that it should have been raised earlier. *Id.* at 33. Under normal principles, "the continuing nature" of such a claim would mean that the "limitations period would be triggered anew by ongoing conduct." *McCarthy v. Madigan*, 503 U.S. at 153 n.5. Here, however, respondent was not even able to appeal the untimeliness determination, because the determination meant that his appeal would not even be accepted for filing.

A particularly striking example can be found following *Strong v. David*, 297 F.3d 646 (7th Cir. 2002), which rejected the argument that a plaintiff's grievance was insufficiently specific, but said the court would enforce "factual detail" requirements if they were promulgated. Surely enough, the Illinois Department of Corrections less than six months later proposed strict new regulations that required "factual details regarding each aspect of the offender's complaint, including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint." Ill. Admin. Code tit. 20, § 504.810(b) (2006); see 26 Ill. Reg. 18065, 2002 WL 31898262, at § 504.810(b) (Dec. 27, 2002) (proposing amendment). It is hard to understand these regulations—which were apparently deemed unnecessary before the Seventh Circuit began enforcing procedural defaults—other than as a response to the opportunity to torpedo prisoner claims on procedural grounds.

"ensur[ing] that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Burnett*, 468 U.S. at 55.

In short, a procedural default rule would create powerful incentives to find ways to dismiss grievances on procedural grounds—and thereby bar federal suits—rather than address them on the merits and leave prisoners free to continue to federal court.[18] And *Wilson* and *Felder* establish that this Court traditionally has presumed that such a result is not what Congress can have intended.

2. Multiple Other Principles Of Statutory Construction Require The Same Result

The procedural default rule petitioners advocate also runs afoul of numerous other principles of construction.

1. This Court has long held that allowing claims to be forfeited through procedural errors is "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972); see also, *e.g.*, *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115 (2002) (construing statute to ensure that "the lay complainant . . . will not risk forfeiting his rights inadvertently"); *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (construing statute to comport with "our admonition that the complete exhaustion rule is not to 'trap the unwary pro se prisoner'") (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)); *Mohasco Corp. v.*

---

[18] For example, in *Riccardo v. Rausch*, 375 F.3d 521, 526 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 1589 (2005), officials exercised their discretion to review an untimely failure-to-protect grievance in a rape case that resulted in a jury verdict of $1.5 million (later reversed on appeal). Under petitioners' rule, prison officials will have strong incentives to reject such grievances on timeliness grounds, and thereby eliminate any risk of such a verdict.

Silver, 447 U.S. 807, 816 n.19 (1980) (court should not "read in a time limitation provision that Congress has not seen fit to include" in statutory scheme in which "laymen . . . initiate the process.") (internal quotation marks omitted).

Here, the claimants are not only laymen, but are also, on average, particularly poorly educated and lacking in literacy skills. See Jerome N. Frank Brief. Some of the affected claimants are even juveniles. See, *e.g.*, *Minix v. Pazera*, No. 1:04 CV 447 RM, 2005 WL 1799538 (N.D. Ind. July 27, 2005). Requiring forfeiture when these individuals inevitably run afoul of procedural rules would clash with the presumption that Congress does not intend to induce forfeitures by such *pro se* litigants.

2. The reluctance to induce forfeitures by *pro se* litigants is particularly applicable here, as "[t]he right to file for legal redress in the courts" is "more valuable" for a prisoner, because, having been "divested of the franchise, the right to file a court action stands, in the words of *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), as his most 'fundamental political right, because preservative of all rights.'" *Hudson v. McMillian*, 503 U.S. 1, 15 (1992); see also *Turner v. Safley*, 482 U.S. 78, 84 (1987) (courts "must take cognizance of the valid constitutional claims of prison inmates").

3. The question whether to read a procedural default rule into § 1997e also implicates the principle that "absent a clearly expressed congressional intention, repeals by implication are not favored." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (internal quotation marks and citation omitted). In *Patsy v. Bd. of Regents*, the Court observed that a § 1983 exhaustion requirement, if it led plaintiffs to run afoul of limitations periods and lose their claims, "might result in the effective repeal of § 1983." 457 U.S. at 514 n.17. Here, the extensive forfeitures that would result from a procedural default rule would produce at least a partial "effective

repeal" of § 1983, *United States v. Vonn*, 535 U.S. 55, 65 (2002) (implied "partial repeal" is "disfavored"), with no "clearly expressed congressional intention," *Branch v. Smith*, 538 U.S. at 273, to impose a forfeiture rule.

4. Reading a procedural default rule into § 1997e would also implausibly attribute to Congress an intention to create an exhaustion rule of uncommon harshness. CRIPA recognized the unfairness in many prison grievance systems by giving courts discretion over exhaustion, and by limiting any required exhaustion to "plain, speedy, and effective" remedies that met "minimum acceptable standards" of fairness and effectiveness. In § 1997e, Congress deliberately eliminated these protections, requiring exhaustion unconditionally. In addition, as this Court held in *Booth*, in doing so Congress eliminated the "futility" exception generally recognized in administrative law. 532 U.S. at 739-41.

This deliberate inattention to whether a grievance system meets even minimal standards of fairness is far more consistent with an intent to require simple exhaustion than with an intent to default claims that run afoul of grievance system rules. Had Congress intended the consequence of a procedural missteps to be elimination of the inmate's claims, it necessarily would have been concerned with the fairness and adequacy of the procedures that could lead to such non-merits forfeitures. Its apparent lack of concern bespeaks an understanding that such forfeitures were not contemplated.

POINT II

THE LEGISLATIVE HISTORY OF THE PLRA PROVIDES NO SUPPORT FOR REQUIRING ANYTHING MORE THAN SIMPLE EXHAUSTION

Petitioners cannot point to even a single statement in the legislative history of the PLRA indicating that any Senator or

Representative intended or expected a rule of procedural default. This striking congressional silence is particularly noteworthy because several legislators addressed how the exhaustion requirement could reduce the frequency of inmate suits,[19] yet they all failed to include the winnowing of suits through procedural default—despite the fact that such a rule would inevitably bar many claims that would otherwise be litigated in federal court. Although data on prisoner grievances are scarce, the frequency with which grievances are rejected on procedural grounds is necessarily high, given the extraordinarily short grievance system limitations periods and the fact that poorly-educated prisoners often must navigate complex systems without counsel. Cf. *Felder*, 487 U.S. at 152 ("Civil rights victims often . . . will fail to file a notice of injury or claim within . . . four months").[20]

Indeed, even in the habeas context—in which prisoners are represented by counsel for at least part of the state process, and filing deadlines are not normally as draconian—

---

[19] Representative LoBiondo, for example, stated that the exhaustion requirement would create an "opportunity for early resolution of the claim" in the administrative process, 141 Cong. Rec. H14078-02, H14105 (daily ed. Dec. 6, 1995), and also argued that the exhaustion requirement "would aid in deterring frivolous claims; by raising the cost in time/money terms." H.R. Rep. No. 104-2468, § 2 (1995); see also 141 Cong. Rec. S7498-01, S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl); 141 Cong. Rec. S18127-03, S18137 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch).

[20] Congress was well aware that jail and prison grievance systems are often unfair or inadequate—in recognition of which CRIPA allowed exhaustion only in systems meeting "minimum acceptable standards"—and expressly made the PLRA exhaustion requirement applicable to all grievance systems, regardless of their fairness. See *Booth*, 532 U.S. 740 n.5.

a Justice Department study roughly contemporaneous with the PLRA found that "*63%* of all habeas petitions are dismissed, and *57% of those are dismissed for failure to exhaust state remedies*." *Duncan v. Walker*, 533 U.S. 167, 186 (2001) (Breyer, J. dissenting) (emphasis added) (reporting study by Bureau of Justice Statistics). If Congress intended or contemplated procedural defaults, the failure to mention such forfeitures as a likely source of caseload reductions is hard to explain.

Indeed, to the extent the legislative history speaks to the issue at all, it suggests that supporters of the bill did *not* contemplate forfeitures, in that they asserted the belief that the PLRA would in no way interfere with the assertion of legitimate claims. See 141 Cong. Rec. S14611, S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."); see also 142 Cong. Rec. S2219-03, S2226 (daily ed. Mar. 18, 1996) (statement of Sen. Reid) ("If somebody has a good case, a prisoner, let him file it."); 141 Cong. Rec. S14611-01, S14628 (daily ed. Sept. 29, 1995) (statement of Sen. Thurmond) (bill will still "allow meritorious claims to be filed").

In addition, a desire to discourage inmate lawsuits without unfairly barring claims is manifest in the various other provisions aimed at dampening prisoner litigation, such as requiring payment of court filing fees by indigent prisoners, 28 U.S.C. § 1915(b)(1)-(2); loss of *in forma pauperis* status for inmates with three meritless claims or appeals, *id.* § 1915(g); judicial screening and dismissal of frivolous

claims at the threshold, *id.* § 1915A(b)(1)-(2); and limiting attorneys' fees, 42 U.S.C. § 1997e(d). These provisions bespeak an effort to reduce claims by making litigation more difficult and costly, rather than by barring claims from court.[21] *None* of these provisions seeks forfeitures.

Petitioners and the United States attempt to remedy the complete absence of legislative history evidence for a procedural default rule by attempting to incorporate *McCarthy v. Madigan* into that history. Under their reasoning, (1) *McCarthy* allegedly assumed that an exhaustion requirement, if the Court adopted one, would necessarily require procedural default of claims rejected officials on procedural grounds; (2) Congress believed this Court erred in *McCarthy* in not requiring exhaustion; (3) ergo, Congress, in departing from *McCarthy* by requiring exhaustion, must also have intended to impose a procedural default sanction. U.S. Br. 18-20; Pet. Br. 16 & n.2.

There are numerous holes in the argument, even if one leaves aside that no legislator actually said anything of the sort. First, *McCarthy*, contrary to the United States' contention, did *not* "assume[] that a general exhaustion requirement ... would incorporate a procedural-default rule." (U.S. Br. 19). *McCarthy* made clear that it was merely addressing the particular rule pressed by the respondent in

---

[21] See, *e.g.*, 141 Cong. Rec. S7498-01, S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl) ("This provision [requiring payment of court costs], like the filing fee provision, will ensure that inmates evaluate the merits of their claim."); 141 Cong. Rec. S18127-05, S18137 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch) ("They will have to pay something to file these charges, and that stops a lot of the frivolous cases right there.").

that case, which included a procedural default component—referring to it as "the rule of exhaustion *proposed* here," 503 U.S. at 150 (emphasis added). *Nothing* in *McCarthy* says that an exhaustion requirement inherently includes procedural default.

In addition, there is no evidence that Congress disagreed with anything except *McCarthy*'s basic holding requiring no exhaustion *at all*. The United States points to the removal of CRIPA's phrase giving district courts discretion to decide whether exhaustion was "in the interests of justice," CRIPA § 7(a), 94 Stat. 352, as somehow approving procedural default. (U.S. Br. 19-20). But that phrase gave courts discretion to decide whether to require *exhaustion* at all, not discretion over whether to impose a procedural default.[22] Congress' reason for removing it from the statute is perfectly obvious: the PLRA takes away judges' discretion not to require exhaustion, and removal of the phrase makes exhaustion mandatory in all cases.

Indeed, the only legislator cited as referring to *McCarthy*, Representative LoBiondo, objected only to the basic holding "that an inmate need not exhaust the administrative remedies available prior to proceeding with a *Bivens* action for money damages only." He further said that the legislation at issue would correct that by "mak[ing] it clear that administrative exhaustion be imposed in all actions arising under the Bivens case." 141 Cong. Rec. H14078-2, H14105 (daily ed. Dec. 6, 1995). He said nothing about procedural default.

---

[22] Indeed, there was no discretion to impose a procedural default, as CRIPA did not even authorize dismissal without prejudice. See *Patsy*, 457 U.S. at 511.

In sum, this Court's decision in *McCarthy* cannot remedy the striking absence of statements by any legislator indicating that he or she intended or contemplated a procedural default rule.

POINT III

PETITIONERS' PUBLIC POLICY ARGUMENTS OFFER NO SUPPORT FOR REQUIRING ANYTHING MORE THAN SIMPLE EXHAUSTION

Given the lack of support for a procedural default rule in § 1997e's text and legislative history, Petitioners' primary argument reduces to the contention that Congress *must* have intended such a rule, because without it "Congress's objectives ... would be subverted"—*i.e.*, the PLRA's success in reducing prisoner litigation "will undoubtedly be reversed if inmates are permitted to file suit without first fully invoking the administrative review process." (Pet Br. 19, 22; see U.S. Br. 8 (decision below is "inconsistent with the PLRA's purposes"). This argument, however, fails in multiple ways. *First*, in the absence of evidence that Congress actually *intended* a particular provision, this Court cannot add the provision on the theory that the statute's purposes would be better served with it than without it. *Second*, the argument depends on an oversimplified and inaccurate caricature of the purposes of the PLRA. *Third*, even if one accepts that oversimplified purpose, the argument that it will be defeated if this Court does not read in a procedural default rule is incorrect.

A. Petitioners' Arguments About The Purported Benefits Of A Procedural Default Rule Should Be Directed To Congress, Not This Court

Petitioners' lengthy argument that the purposes of the PLRA would be "subverted" in the absence of a procedural default rule (see Pet. Br. 19-30; U.S. Br. 20-28) is simply not

a legitimate basis for reading the word "exhausted" as "properly exhausted" or adding a procedural default sanction when there is no affirmative evidence Congress intended it. Even if this Court were to believe the omission was inadvertent, the argument that "it is [this Court's] duty to ask how [Congress] would have decided had they actually considered the question" "profoundly mistakes [the Court's] role." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991).

Thus, the Court has repeatedly made clear that it will not "read an absent word into [a] statute," *Lamie*, 540 U.S. at 538, or "engraft [a] policy choice onto the statute," even where the requested rule "undoubtedly would serve the Government's objectives." *Landano*, 508 U.S. at 181. Thus, even if it were true that the PLRA would make more sense with a procedural default rule, "[n]o mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute." *Goldenberg*, 168 U.S. at 103. In short, petitioners' policy arguments are "best addressed to Congress, not this Court." *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 28 (1997); see also, *Dodd*, 125 S. Ct. at 2483 (refusing to "rewrite" statute despite "potential for harsh results").

B. Petitioners Cannot Reasonably Contend That The Statutory Purpose Is To Reduce Lawsuits At All Costs

Petitioners' argument that the PLRA's goals require a procedural default sanction is premised on a basic fallacy: that the PLRA's purpose is simply to reduce the volume of frivolous prisoner litigation, and whatever helps to reduce such litigation necessarily serves the purposes of the statute. The fallacy in such a single-faceted view of statutory purpose has been expressly addressed by this Court:

> *[N]o legislation pursues its purposes at all costs.* Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and *it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.*

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (per curiam) (emphasis added).

Here, while it is clear that Congress sought to "reduce the quantity and improve the quality of prisoner suits," *Porter v. Nussle*, 534 U.S. at 525, it is also clear that Congress was not willing to enact "whatever furthered" the objective of reducing prisoner litigation. Had that been the sole purpose of the statute, Congress could simply have barred all prisoner litigation from the federal courts (leaving state courts as the only forum for prisoners), or imposed its own shortened limitations period or other procedural traps. That was not the sole purpose, however: the backers of the legislation made clear that they wanted to reduce prisoner lawsuits but to do so in a way that did *not* "prevent inmates from raising legitimate claims. . . . [T]his legislation will not prevent those claims from being raised." 141 Cong. Rec. S14611, S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch); see generally *supra* Point II.

A fair description of the legislative compromise embodied in the statute, therefore, would have to recognize that it was important to Congress not to go too far, and that the statutory purpose was, in essence, "to reduce the volume of inmate litigation while not preventing inmates from pursuing legitimate claims." And a procedural default rule, while serving one statutory purpose, would clearly have been contrary to the purpose of preserving legitimate claims.

Indeed, because no mention of procedural default was made at any point, it is impossible to know whether an express procedural default component might have made the legislation more difficult to pass.

In sum, petitioners improperly assume that "whatever furthers the statute's primary objective must be the law," *Rodriguez*, 480 U.S. at 526, and justifying on that basis the imposition of a procedural default rule would "frustrate[] rather than effectuate[]" Congress' intent. *Id.*

C. Even If Petitioners Were Correct About The Statute's Purpose, Their Claim That § 1997e Is "Meaningless" Without Procedural Default Is Incorrect

Petitioners also err in their claims that "the PLRA's exhaustion mandate is rendered meaningless by a rule that permits prisoners to 'exhaust' state remedies by not complying with the available state process," Pet. Br. 29, and that "Congress' success under the PLRA . . . will undoubtedly be reversed" in the absence of a procedural default rule, *id.* at 22.

As an initial matter, petitioners have made no showing that any part of the dramatic "roughly 50%" drop in the rate of inmate litigation they cite (Pet. Br. 21-22) resulted from a procedural default rule. The drop occurred between 1995 and 2000, *before Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002), the first appellate decision to hold that § 1997e imposed a procedural default sanction.[23]

---

[23] Previously, many courts dismissed unexhausted claims without prejudice, on the belief that the inmate, even if his grievance was time-barred, could still exhaust. *E.g.*, *Walker v. Maschner*, 270 F.3d 573, 577

More fundamentally, the claim that § 1997e's exhaustion rule is "meaningless" in the absence of a forfeiture rule is demonstrably incorrect. First, prior to the PLRA, an inmate who felt he had been wronged could proceed immediately to federal court. With the passage of § 1997e, the inmate no longer has that option; at a minimum, he must wait until his deadline for filing a grievance passes. By the end of the period, he may no longer wish to file suit.

In addition, because most grievance systems give administrators the discretion to hear untimely grievances, see, *e.g.*, Cal. Code Regs. tit. 15, § 3084.3(c),[24] a prisoner will not be able to bypass the grievance system through the mere passage of time—the discretion to excuse untimeliness will mean his remedies in the grievance system are not "unavailable" under § 1997e. Rather, the prisoner will be required to file an untimely grievance, and thereby give the grievance system what is important under the PLRA: the "*opportunity* to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. at 525 (emphasis added). For this reason, petitioners' citation (Pet. 17) of the statement in *Porter* that Congress was unlikely "to leave the need to exhaust to the pleader's option," 534 U.S. at 530, misses the point: so long as the grievance system may choose to hear his claim, the inmate's remedies are not unavailable, and he cannot get to

---

(8th Cir. 2001); see Kermit Roosevelt III, *Exhaustion Under The Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1780-81 (2003) (describing cases).

[24] See also K. Roosevelt, *supra*, 52 EMORY L.J. at 1810 & n.192.

federal court *without* submitting a grievance no matter how artfully he pleads his complaint. [25]

That is what happened in this case: respondent sought informal resolution and then filed his grievance, which concerned an ongoing problem. He thereby gave the grievance system the opportunity to address it. If prison officials choose to decide such a grievance on the merits, they may resolve the case in a way that "obviat[es] the need for litigation." *Id.* at 525. The prisoner may be satisfied by redress obtained through the system; by the explanation he receives; or merely by being given a forum in which to vent his complaint.

Moreover, even if the grievance system rejects the claim as untimely (as it did here), the effort of filing the grievance and proceeding through the system may dissuade the inmate from subsequently filing suit—an example of the exhaustion requirement preventing a lawsuit by "raising the cost" for the prisoner in terms of his investment of time and effort. H.R. Rep. No. 104-2468, § 2 (1995). The fact that Congress required exhaustion even where an administrative grievance was "futile," *Booth*, 532 U.S. at 741 n.6, makes clear that Congress believed there would be benefit to requiring the filing of a grievance even where a resolution that would satisfy the inmate was highly unlikely. Thus, while the exhaustion requirement alone may not reduce the filing of

---

[25] Petitioners contend that grievance systems cannot address untimely grievances because they are insufficiently fresh, Pet. Br. 24-25, but offer no reason why claims grow unacceptably stale in grievance systems within 15 business days, when courts are able to tolerate far longer limitations periods.

federal suits by *as much* as would a procedural default sanction, the exhaustion requirement is hardly "meaningless" without procedural default.

Indeed, the absence of a procedural default sanction may spur grievance systems to resolve *more* claims on the merits, because the absence of such a sanction would remove the incentive for jail and prison officials to reject claims on procedural grounds as a way of keeping inmates out of court.

Conversely, relying on jail and prison grievance systems as a basis for procedural defaults may have the perverse effect of involving the federal courts in scrutinizing the adequacy of procedural rules to bar § 1983 actions. See, *e.g.*, *Robertson v. Wegmann*, 436 U.S. 584 (1978). This would run contrary to Congress' goal in the PLRA of *reducing* federal oversight of state prisons.

Finally, the argument that Congress cannot rationally have chosen to require invocation of state remedies without providing for procedural default is rebutted by other schemes following exactly that pattern. First, for many years the habeas exhaustion requirement was not accompanied by a procedural default rule; under *Fay v. Noia*, only a "deliberate bypass" of state remedies barred a claim from federal court. Although that circumstance changed with the creation of the modern procedural default doctrine in *Wainwright v. Sykes* in 1977, the Court's prior rule precludes any argument that requiring exhaustion without a procedural default rule is inherently irrational.

Even closer to the PLRA exhaustion requirement are the schemes at issue in *Oscar Mayer* and *Commercial Office Products*. In those cases, as under the PLRA, the statutory scheme required invoking a state administrative remedy to give the agency a non-binding "opportunity to settle the grievances of ... claimants in a voluntary and localized manner so that the grievants thereafter have no need or

desire for independent federal relief." *Oscar Mayer*, 441 U.S. at 761. The findings of the state agency, as here, had no effect in federal court; the federal suit proceeded *de novo*. In both cases, this Court determined that Congress, despite requiring invocation of state remedies, did *not* intend that command to be enforced through a procedural default rule, stressing that (as here) the claimants were laymen without the aid of attorneys, and the relevant statutes "contained no express requirement of timely state filing." *Commercial Office Prods.*, 486 U.S. at 123; see *Oscar Mayer*, 441 U.S. at 761-64. And the Court expressly rejected the argument that it would be irrational for Congress to require invocation of state remedies without a default sanction to ensure that they were invoked in a timely and proper fashion. *Id.* at 764.

To be sure, the statutes at issue did not use the word "exhaustion," but the substance of what they required is far more similar to what PLRA exhaustion requires than are typical federal administrative schemes. See *supra* n.14. And they show beyond doubt that Congress did not believe the requirement to invoke state remedies would be "meaningless" in the absence of a procedural default rule.

POINT IV

PETITIONERS' REQUEST THAT THIS COURT CRAFT A FORFEITURE RULE BY "ANALOGY" TO HABEAS CASES IS MISCONCEIVED

Petitioners also err in inviting this Court to create a *judge-made* procedural default doctrine by "analogy" to the judge-made default doctrine in habeas cases. Pet. Br. 26. This argument is doubly misconceived, because this Court's power to create that doctrine in habeas stems from an equitable discretion that it lacks here, and because the reasons for the habeas rule are overwhelmingly absent here.

Unlike most circumstances, in which federal courts have a "virtually unflagging obligation" to exercise the jurisdiction granted them, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), in habeas this Court has an "equitable discretion" to craft the scope of the historic writ, including the discretion to create "gateway[s] through which a habeas petitioner must pass before proceeding to the merits of a constitutional claim." *Withrow v. Williams*, 507 U.S. 680, 718 (1993) (Scalia, J., concurring in part and dissenting in part) (internal quotation marks omitted); see also, *e.g.*, *id.* at 716 (equitable discretion is "evident from the [statutory] text . . . provid[ing] that writs of habeas corpus 'may be granted'. . . and enjoin[ing] the court to 'dispose of the matter as law and justice require'") (quoting 28 U.S.C. §§ 2241(a), 2243); *Noia*, 372 U.S. at 438 ("[H]abeas corpus has traditionally been regarded as governed by equitable principles.").[26] It is this equitable discretion that justifies this Court's creation of the procedural default doctrine and other "gateway" doctrines that, for various reasons of policy, limit the otherwise-sweeping grant of habeas jurisdiction. *Withrow*, 507 U.S. at 715-18 (opinion of Scalia, J.) (citing *Fay v. Noia* and *Wainwright v. Sykes*); see also *Dretke v. Haley*, 541 U.S. 386, 392 (2004) (procedural default doctrine is a "body of equitable principles" and is "prudential").

---

[26] This discretion is supported by the status of habeas corpus as a writ long shaped by the courts; the recognition of the writ in the Constitution; the language of the habeas corpus statutes; and Congress' recognition of the courts' historic role in defining the writ's boundaries. Cf. *Daniels v. Allen*, 344 U.S. 443, 500 (1953) (Frankfurter, J.) ("By giving the federal courts [habeas corpus] jurisdiction, Congress has imbedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims.").

There is no similar authority here to craft a freestanding judge-made doctrine. In the absence of habeas-like "equitable discretion," this Court's unwillingness to "engraft[ing a] policy choice onto [a] statute," *Landano*, 508 U.S. at 181, or "enlarg[ing]" a statute, *Lamie*, 540 U.S. at 538, is fully applicable. Indeed, the judge-made rule petitioners request is particularly inappropriate in that it would permanently bar from federal court cases over which Congress has conferred jurisdiction. See *Col. River*, 424 U.S. at 817 ("virtually unflagging obligation" to exercise jurisdiction in such cases); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("no ... right to decline the exercise of jurisdiction which is given").

In any event, even if the Court did have authority to create a procedural default doctrine not required by § 1997e, the primary basis for the doctrine in habeas is inapplicable here. The doctrine derives from the fact that a habeas petition—unlike an inmate's § 1983 action—is a collateral attack on the prior state-court proceeding, and it is the state proceeding that is supposed to be "the 'main event,' ... rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Sykes*, 433 U.S. at 90. Specifically, the doctrine:

> "has its ... basis in the 'adequate and independent state ground' doctrine". ... [which] provides that federal courts "will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision."

Franklin v. Johnson, 290 F.3d 1223, 1230 (9th Cir. 2002) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)); *see Lee v. Kemna*, 534 U.S. 362, 375 (2002).

The procedural default doctrine thus helps to ensure that it is the state trial and not the subsequent habeas proceeding that is the "main event," *Sykes*, 433 U.S. at 90, and is a necessary counterpart to the adequate and independent state ground doctrine, to avoid the anomaly that "a federal district court or court of appeals would be able to review claims that [this Court] would have been unable to consider on direct review." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) (citing *Coleman*, 501 U.S. at 730-31).

None of these considerations applies here. A prison grievance process that must be exhausted clearly is *not* the "main event"; indeed, any administrative decision has no effect on the subsequent § 1983 suit. Likewise, there is no concern about reviewing a judgment resting on an adequate and independent state ground. This is critical, as that concept provides the foundation for the procedural default doctrine, see *Sykes*, 433 U.S. at 81-82; see also, *e.g.*, *Edwards*, 529 U.S. at 452-53 (referring to procedural default as "'the independent and adequate state ground doctrine'") (quoting *Coleman*, 501 U.S. at 732).[27]

Conversely, sanctioning an inmate litigant with default creates a greater unfairness here than in habeas cases. In habeas, the

---

[27] Petitioners argue that under *Preiser v. Rodriguez*, 411 U.S. 475 (1973), federal-state comity is as important in the prison context as it is in habeas cases. However, the basis of the procedural default doctrine is not simple comity; it is that a default is an independent and adequate state ground that precludes federal review on direct appeal and must be equally preclusive in habeas cases– reasoning inapplicable here. *Preiser*, moreover, addressed only the particular category of prisoner claims challenging the fact or duration of imprisonment, which "fell squarely within the traditional purpose of federal habeas corpus." *Id.* at 492 n.10.

prisoner is not losing his primary opportunity to vindicate his rights, because he has already had a full and fair opportunity to assert those rights in the "main event": his state trial. Under the PLRA, the federal claim being defaulted *is* the main event, and is the prisoner's only opportunity to vindicate his federal rights.

Moreover, the *basis* for the default is different. Procedural rules in state courts presumptively provide defendants a fair opportunity to assert their rights, the defendants are often represented by counsel, and the rules are governed by precedent and applied by disinterested judges. By contrast, there is no assurance that grievance procedures comply with basic principles of fairness, they are not governed by established bodies of law, and they are applied by jail and prison employees who, at best, are not judges, and at worst may have an interest in applying the rules in a way that causes inmates to forfeit their federal claims.

In sum, even if this Court had the authority to create an extra-statutory procedural default doctrine here, the analogy to habeas provides no basis for creating one.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

DONALD B. AYER
THOMAS J. DAVIS
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

MEIR FEDER
(Counsel of Record)
CHARLES R.A. MORSE
KATE BUSHMAN
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

February 2, 2006

Counsel for Respondent

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

JEANNE S. WOODFORD and ANTHONY P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MADEIROS
State Solicitor General
JAMES M. HUMES
Chief Assistant Attorney General
FRANCES T. GRUNDER
Senior Assistant Attorney General
THOMAS S. PATTERSON
Supervising Deputy Attorney General
JENNIFER G. PERKELL
Deputy Attorney General
Counsel of Record
State Bar No. 203205
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5726
Fax: (415) 703-5843
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	1
A. Established Exhaustion Principles Require Compliance With Applicable Procedural Rules, Including Filing Deadlines	1
B. The Statutory Language Does Not Support a Rule of Untimely Exhaustion	4
C. Section 1997e's Legislative History Supports the Conclusion that Congress Intended the PLRA's Exhaustion Mandate to Require "Proper" Exhaustion	7
D. Congress's Purposes in Enacting § 1997e(a) Are Evidence of Congress's Intent to Require Proper Exhaustion	9
E. The Habeas Analogy Favors Petitioners' Position Because the Policy Reasons Underlying this Court's Conclusion that the Federal-Habeas Exhaustion Requirement Compels Compliance With State Procedural Rules Are Similarly Present Here	12
F. Respondent's Various Policy Concerns Cannot Overcome Congress's Intent Under the PLRA's Exhaustion Requirement	14
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Abramson v. Univ. of Haw., 594 F.2d 202 (9th Cir. 1979) 18

Bell v. Wolfish, 441 U.S. 520 (1979) 16

Booth v. Churner, 532 U.S. 731 (2001) 7, 8, 9, 12

Burnett v. Grattan, 468 U.S. 42 (1984) 15, 16

Coleman v. Thompson, 501 U.S. 722 (1991) 2, 13, 19

Del. State Coll. v. Ricks, 449 U.S. 250 (1980) 18

Dretke v. Haley, 541 U.S. 386 (2004) 13

Edwards v. Carpenter, 529 U.S. 446 (2000) 3, 12, 13

EEOC v. Commercial Office Prods. Co., 486 U.S. 107 (1988) 14

Felder v. Casey, 487 U.S. 131 (1988) 14, 15, 16

Francis v. Henderson, 425 U.S. 536 (1976) 2

Martinez v. California, 444 U.S. 277 (1980) 15

McCarthy v. Madigan, 503 U.S. 140 (1992) 7, 8

Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494 (1986) 2

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 14, 16

Overton v. Bazzetta, 539 U.S. 126 (2003) 16

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 3, 12, 13

Porter v. Nussle, 534 U.S. 516 (2002) ..... *passim*

Pozo v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002) 1, 13

Preiser v. Rodriguez, 411 U.S. 475 (1973) 13

TABLE OF AUTHORITIES – Continued

Page

Procunier v. Martinez, 416 U.S. 396 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989) 16

Sims v. Apfel, 530 U.S. 103 (2000) 1

Spruill v. Gillis, 372 F.3d 218 (3d Cir. 2004) 15

Strong v. David, 297 F.3d 646 (7th Cir. 2002) 17

Thomas v. Woolum, 337 F.3d 720 (6th Cir. 2003) 4, 14

United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952) 1

Wainwright v. Sykes, 433 U.S. 72 (1977) 2

Wilson v. Garcia, 471 U.S. 261 (1985) 3, 15

Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003) 6

STATUTES

42 United States Code, Title
§ 1983 15
§ 1997e 2, 7, 10, 19
§ 1997e(a) ..... *passim*
§ 1997e(a), (b) (1994) 15
§ 1997e(a)(1) 9
§ 1997e(c)(2) 5

California Code of Civil Procedure
§ 335.1 3
§ 352.1(a) 3

REGULATIONS

California Code of Regulations, title 15,
§ 3084.2(a) 16

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

141 Cong. Rec. H14078-02, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo) 7

A Dictionary Of Modern Legal Usage 902 (2d ed. 1995) 4

California Department of Corrections and Rehabilitation, Regulation and Policy Management Branch, Correctional Standards Authority, http://www.cdcr.ca.gov/BudgetRegs/RPMB.html 17

Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866, S. 930, H.R. 667 Before the Senate Comm. on the Judiciary, 104th Cong. 20-21 (1995) (Associate Attorney General John R. Schmidt) 2

Webster's Third New International Dictionary 2513 (1993) 4

INTRODUCTION

Respondent argues that when Congress invigorated the administrative-exhaustion requirement for prisoners under the Prison Litigation Reform Act (PLRA), it nonetheless intended to permit inmates to "exhaust" by ignoring prison filing deadlines, with the inevitable result that many grievances will reach federal court without receiving any prior review on the merits. This argument is not supported by the statute's language, history, or purposes.

ARGUMENT

A. Established Exhaustion Principles Require Compliance With Applicable Procedural Rules, Including Filing Deadlines.

In requiring exhaustion of administrative remedies under § 1997e(a), Congress invoked a principle that has an established legal meaning: under the "ordinary 'exhaustion' or 'waiver' rule" in administrative law, "a reviewing court will not consider arguments that a party failed to raise in a timely fashion" before the administrative agency. *Sims v. Apfel*, 530 U.S. 103, 114-15 (2000) (Breyer, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting); *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (holding that, "as a general rule," courts should not disturb administrative decisions "unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice"); *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002) (observing that the concept of exhaustion in administrative law "means using all steps that the agency holds out, and doing so *properly*" (emphasis in original)). While it is true that in the administrative-law realm a federal court reviews an administrative decision rather than deciding a claim *de novo*, Resp. Br. 24, this distinction has no bearing on how Congress would have understood the meaning of the term "exhaust" in § 1997e(a). As the court of appeals itself noted, proponents of the PLRA

sought to bring § 1997e's exhaustion requirement "'more into line with administrative exhaustion rules that apply in other contexts.'" Pet. App. 6 (quoting *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866, S. 930, H.R. 667 Before the Senate Comm. on the Judiciary*, 104th Cong. 20-21 (1995) (statement of Associate Attorney General John R. Schmidt)). And as Respondent acknowledges, administrative-exhaustion rules in other contexts include an "ordinary waiver principle." Resp. Br. 24. Under the PLRA, Congress mandated exhaustion of administrative remedies without indicating any intent to deviate from the established meaning of exhaustion in the administrative-law context. *See Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

Similarly, despite this Court's recognition of the historic, technical distinction in federal habeas between the interrelated concepts of exhaustion and procedural default, Resp. Br. 16-22, the exhaustion doctrine in modern habeas law has nonetheless always been accompanied by a requirement that prisoners comply with state procedural rules. Even before the enactment of the PLRA, this Court consistently held in the habeas context that the necessary consequence of a failure to satisfy state filing deadlines or other procedural rules is that a subsequent federal action is barred. *E.g., Coleman v. Thompson*, 501 U.S. 722, 727, 757 (1991) (holding that action in federal habeas was barred by untimely state notice of appeal); *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977) (barring federal-habeas action for noncompliance with state contemporaneous-objection rule); *Francis v. Henderson*, 425 U.S. 536, 540 (1976) (barring federal-habeas action because state claim of grand jury discrimination was untimely). And more recently, this Court explicitly confirmed the "inseparability" of the exhaustion and procedural-default concepts when it observed that the purposes of the habeas statute's exhaustion requirement would be "utterly defeated" if prisoners were permitted to

obtain federal habeas review simply by letting the time run on state remedies. *Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). Indeed, the court of appeals in this case acknowledged the "merger of exhaustion with procedural default," Pet. App. 14, but simply disagreed that the habeas analogy informed the proper interpretation of the PLRA's exhaustion requirement, Pet. App. 14-16. It would be illogical to assume, as Respondent argues, that in enacting the PLRA, Congress adopted a meaning of exhaustion from the federal-habeas context that this Court itself has not relied on to determine the outcome of its habeas decisions.

Moreover, Respondent and his *amici* have failed to identify any other context in which the rule of untimely "exhaustion" that they propose is sufficient. Accordingly, if Respondent and his *amici* are correct in their interpretation of § 1997e(a), then the *only* context in which untimely exhaustion would open the door to a federal action would be under the PLRA – a highly implausible result, especially in light of the fact that Congress enacted the PLRA's exhaustion requirement for the specific purpose of putting a stop to abusive lawsuits. Respondent and his *amici* also cannot explain why Congress would have enacted an exhaustion requirement that enables a prisoner to wait nearly two years[1] – or longer if the statute of limitations is longer – to begin "exhausting" administrative remedies, with the virtually certain result that the prison will reject the claims as untimely. In other words, "Congress could not have intended a definition of exhaustion that routinely

---

[1] In California, the statute of limitations for personal injury actions, and thus for § 1983 actions, is two years. Cal. Code Civ. Proc. § 335.1; *see Wilson v. Garcia*, 471 U.S. 261, 276 (1985). This limitations period, however, may be tolled for an additional two years if, at the time the plaintiff's cause of action accrued, he was serving a prison sentence on a criminal conviction for a term "less than for life." Cal. Code Civ. Proc. § 352.1(a). Therefore, for the majority of prisoners in California, the applicable statute of limitations is four years.

permits claims to reach the federal courts without the benefit of any prior consideration on the merits." *Thomas v. Woolum*, 337 F.3d 720, 750 n.8 (6th Cir. 2003) (Rosen, J., dissenting in part and concurring in judgment). For at least this reason, Respondent's argument that procedurally defective grievances that are properly rejected by prison officials satisfy the PLRA's exhaustion mandate cannot be right.

B. The Statutory Language Does Not Support a Rule of Untimely Exhaustion.

Respondent contends that the temporal nature of the word "until" in § 1997e(a)'s directive that no action shall be brought "until such administrative remedies as are available are exhausted" means that "the question to be answered is simply whether the prisoner can file suit now or must wait until later." Resp. Br. 11. But Congress's use of "until" is entirely consistent with Petitioners' position. As the United States correctly observed, the word "until" – meaning "before the time that," *Webster's Third New International Dictionary* 2513 (1993) – encompasses the possibility that the "time" of exhaustion will never arrive because of an inmate's procedural default. *See* U.S. Br. 13-14; *see also A Dictionary Of Modern Legal Usage* 902 (2d ed. 1995) (stating that "the meaning of *until* swallows that of *unless* in most contexts"). Therefore, the fact that Congress chose "until" rather than "unless" may suggest nothing more than that Congress expected, in light of § 1997e(a)'s express directive, that inmates would properly avail themselves of the prison-administrative-grievance process. Respondent also insists that the present-tense "are exhausted" requires a focus on what, if any, remedies are available at the time the inmate seeks to file suit. Resp. Br. 12. Again, Congress's use of the word "are" is consistent with the rule advocated by Petitioners: that a prisoner may not file suit until administrative remedies

"are" *properly* exhausted. Resp. Br. 12. Furthermore, the force of Respondent's arguments concerning the necessary meaning of "until" and "are" is undercut by Respondent's later contention that, even though the habeas exhaustion requirement employs the words "unless" and "has" rather than "until" and "are," it nonetheless is also only a timing rule. Resp. Br. 16 n.5.

Respondent further argues that § 1997e(c)(2) of the PLRA,[2] which provides that a court may dismiss a prisoner's facially deficient claims without first requiring exhaustion, shows that Congress did not intend to require an inmate's compliance with administrative rules. Resp. Br. 13-14. This provision, however, does nothing to undermine Petitioners' position that the PLRA's exhaustion mandate requires "proper" exhaustion. As an initial matter, § 1997e(c)(2) does not necessarily reflect a judgment by Congress that dismissal without first requiring exhaustion would always save the courts time and resources. Resp. Br. 14. Rather, the provision may reflect only that Congress wished to afford a district court the discretion to choose between which basis for dismissal – either on exhaustion grounds or because of the facial deficiencies of the complaint – it determined would be the best course in a particular case. This option recognizes the strong public policy favoring resolution of cases on their merits.

In addition, Respondent is incorrect that the savings in time and resources contemplated by § 1997e(c)(2) would only be realized if Congress assumed that dismissal for non-exhaustion would permit the inmate to re-invoke prison grievance proceedings, "exhaust" an untimely grievance, and then return to federal court. Resp. Br. 14.

---

[2] 42 U.S.C. § 1997e(c)(2) states: "In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies."

First, it is possible that at the time a district court rules on a complaint the prisoner would still be able to properly exhaust – either because the administrative filing deadline has not yet expired, or because the prisoner is able to receive an extension of time to submit his grievance. Second, assessing the exhaustion question is almost always a more onerous task for the courts than reviewing the face of the complaint for merit. This is because courts dismiss facially invalid claims based solely on a review of the allegations of the complaint, whereas in order to determine whether exhaustion has been accomplished they must often evaluate and weigh evidence. For example, in the Ninth Circuit, non-exhau tion is an affirmative defense that the defendants must plead and prove. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). Unless the plaintiff concedes a failure to exhaust, the defendants must produce evidence in support of their affirmative defense. *Id.* at 1120 (holding from a review of the record that defendants failed to meet burden of showing that plaintiff did not exhaust administrative remedies). Moreover, when a district court looks beyond the pleadings to decide exhaustion – a procedure that the Ninth Circuit recognizes is "closely analogous to summary judgment" – it must further afford the plaintiff an opportunity to "develop a record." *Id.* at 1120 n.14. Non-exhaustion is also an affirmative defense in at least five other circuits. *See id.* at 1117 (citing decisions out of the Second, Third, Seventh, Eighth, and D.C. Circuits). Therefore, even if an inmate's failure to exhaust bars him from proceeding with his federal action because he defaulted on administrative remedies, it is still frequently far less burdensome and time-consuming for a court to review the face of the complaint for meritless allegations than to evaluate and weigh evidence in a summary-judgment-like proceeding to determine non-exhaustion.

C. Section 1997e's Legislative History Supports the Conclusion that Congress Intended the PLRA's Exhaustion Mandate to Require "Proper" Exhaustion.

Respondent also accuses Petitioners and the United States of "attempting to incorporate" into the PLRA's legislative history this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992) (holding that a federal prisoner suing federal prison officials for money damages did not have to exhaust administrative remedies). Resp. Br. 37. However, in *Booth v. Churner*, 532 U.S. 731, 739 (2001), this Court itself treated *McCarthy* as a part of the "statutory history" of the PLRA's exhaustion requirement. In holding that the PLRA mandates exhaustion regardless of the relief offered through prison grievance procedures, this Court presumed that Congress had *McCarthy* in mind when it invigorated § 1997e(a). *Id.* at 740-41. Indeed, Representative LoBiondo's express reference to *McCarthy* during the congressional debates on the PLRA confirms this fact. 141 Cong. Rec. H14078-02, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo). Accordingly, what this Court said in *McCarthy* is highly relevant to congressional intent behind the PLRA's exhaustion provision. And the Court observed in *McCarthy* as one of the two grounds for its conclusion that it would not understand the former § 1997e (part of the Civil Rights of Institutionalized Persons Act, or CRIPA) to require exhaustion in the absence of a clear congressional mandate, that an exhaustion requirement would create a "risk of forfeiture" of the prisoner's claims for failure to comply with administrative deadlines. *McCarthy v. Madigan*, 503 U.S. 140, 152 (1992). Because of this risk of forfeiture, the Court held that such deadlines counsel against "exhaustion as a prerequisite to the filing of a federal-court action." *Id.* at 153. With the enactment of the PLRA, however, Congress removed from § 1997e the discretionary language upon which this Court expressly relied to hold in *McCarthy* that exhaustion was not automatically required, and could thus

be dispensed with even "if an inmate fails to meet filing deadlines under an administrative scheme," *id.* at 150, and replaced that language with a firm exhaustion directive, 42 U.S.C. § 1997e(a) (2000). In so doing, Congress "presumably understood" that under *McCarthy* such an express exhaustion requirement would necessitate compliance with administrative filing deadlines. *Booth*, 532 U.S. at 740.

In light of the presumption that Congress legislated with a full awareness of *McCarthy*, the ACLU's argument that Congress did not contemplate a default-inducing exhaustion rule under the CRIPA misses the point. ACLU Br. 12-29. When Congress enacted the PLRA, it was not revising the exhaustion provision in a vacuum, but was *responding to* the *McCarthy* decision. Moreover, contrary to Respondent's contention, there is no suggestion in either *McCarthy* or the government's brief in that case (including the portion of the brief cited by the ACLU) that the rule of exhaustion "proposed" by the government was anything other than a general rule that federal prisoners must exhaust administrative remedies. Resp. Br. 37-38; ACLU Br. 10 & n.2. In other words, it was not the government, but rather the Court itself that introduced the concept of "forfeiture," *McCarthy*, 503 U.S. at 152, into the discussion of the "doctrine of exhaustion of administrative remedies," *id.* at 144.

Furthermore, the CRIPA's express limitation on the exhaustion obligation under § 1997e(a)(1) instructing the courts to merely "continue" a case for a limited time to permit exhaustion – even if filing deadlines have passed – suggests that Congress has always understood that, under a *normal definition* of exhaustion, a failure to comply with filing deadlines would require dismissal of the case. Although under the CRIPA Congress may have concluded that "untimely exhaustion would suffice," ACLU Br. 13 n.5, the CRIPA scheme is "now a thing of the past," *Booth*, 532 U.S. at 739. That is, it was the CRIPA's limiting

language in § 1997e(a)(1) that converted a normal exhaustion regime into one in which the forfeiture of a claim for non-exhaustion was precluded. With the enactment of the PLRA, however, Congress removed that limiting language, replacing the CRIPA's qualified exhaustion provision with an ordinary exhaustion rule.

Finally, contrary to Respondent's and his *amici*'s contentions, statements by congressional proponents of the PLRA that they did not want to prevent inmates from raising legitimate claims in court are consistent with an intent to require "proper" exhaustion. *See* Resp. Br. 36-37; ACLU Br. 24. First, that these legislators understood that the PLRA would not preclude certain claims – those that are *meritorious* – suggests that they simultaneously contemplated that other claims – those that are unmeritorious – would, in fact, be barred. And second, under a rule of "proper" exhaustion, meritorious claims *will* reach the federal courts, as long as prisoners file their grievances in conformity with prison administrative rules.

D. Congress's Purposes in Enacting § 1997e(a) Are Evidence of Congress's Intent to Require Proper Exhaustion.

Respondent argues that "in the absence of evidence that Congress actually *intended* a particular provision, this Court cannot add the provision on the theory that the statute's purposes would be better served" thereby. Resp. Br. 39. But a statute's purpose is evidence of congressional intent, and the purposes of the PLRA's exhaustion provision are undisputed. This Court identified § 1997e(a)'s purposes in both *Booth* and *Porter*, and expressly relied on them in *Porter* in interpreting the meaning of the provision. *Booth v. Churner*, 532 U.S. 731, 737 (2001); *Porter v. Nussle*, 534 U.S. 516, 524-25, 528 (2002). Those purposes are to enable prison officials to: investigate and respond to inmate complaints, and thereby potentially obviate the

need for litigation; screen out claims that are frivolous or do not rise to the level of a constitutional violation; and create a factual record that would be beneficial in the event that litigation ultimately ensues. *Porter*, 534 U.S. at 524-25. Accordingly, contrary to Respondent's assertion, there is ample evidence in these objectives to support the conclusion that Congress intended the PLRA's exhaustion requirement to compel compliance with available administrative procedures, including filing deadlines.

Moreover, Respondent's contention that the statute's lack of an express reference to a procedural-default mechanism constitutes an "omission" rests on the assumption that Congress did not understand the term exhaustion to mean "proper" exhaustion in the first instance. Resp. Br. 40. As previously noted, however, this assumption is insupportable in light of: (1) the fact that established exhaustion principles in the administrative law and federal habeas contexts require "proper" exhaustion; (2) the fact that Congress sought under the PLRA to bring exhaustion for prisoner suits "more into line with administrative exhaustion rules that apply in other contexts," Pet. App. 6; (3) the absence of any other context in which untimely "exhaustion" is sufficient; and (4) and the legislative history of § 1997e demonstrating that Congress was aware of this Court's assumption that an exhaustion requirement for prisoner suits would entail "proper" exhaustion.

Neither Petitioners nor their *amici* contend that the *sole* purpose of the PLRA's exhaustion mandate is "to reduce the volume of frivolous prisoner litigation." Resp. Br. 40. As noted above, the main purposes of the statute are to afford correctional officials the "time and opportunity" to fully investigate and respond to prisoner complaints internally so as to obviate the need for litigation, screen out frivolous claims, and develop an administrative record that would be useful in litigation that is not precluded. *Porter*, 534 U.S. at 525. Those are the purposes that are undermined by the interpretation proposed by Respondent.

Moreover, Respondent's attempts to explain away the inadequacy of a rule permitting an inmate to file a grievance at any time – even if months or years after the event – fall short in light of Congress's statutory objectives. First, Respondent's suggestion that an inmate who is deliberately waiting out the expiration of the applicable filing deadline would miraculously change his mind and decide not to "file suit" rings hollow. Resp. Br. 43. The inmate intent on manipulating the appeals process is the one invariably most determined to get into federal court regardless of whether his claims have any merit. Second, the argument that the discretion afforded to prison officials in some states to hear untimely grievances translates into a remedy that is "available" to the inmate is misconceived – such a remedy is only available *after* prison officials have chosen to exercise that discretion, a result that is largely the exception rather than the rule. Resp. Br. 43-44. Furthermore, prison officials are unlikely in most instances to have the time and resources to hear an untimely grievance. This is especially true if the grievance is submitted so late that evidence, witnesses, and recollections are no longer available. In addition, an "opportunity" to hear a grievance presented months after the filing deadline is, in many instances, not the least bit meaningful. In this case, for instance, Mr. Ngo's untimely filing wholly deprived prison officials of *any* opportunity to provide "redress" for his contested placement in administrative segregation because that confinement had ended six months earlier. Resp. Br. 44. Moreover, this "some opportunity" argument depends on state regulations actually permitting prison officials the option of waiving filing deadlines, something that not all state regulations do. *See* States' Br. 9-10. Third, the "effort of . . . proceeding through the system" following the rejection of an untimely grievance that Respondent cites as a "cost" to the prisoner that may dissuade him from filing suit is largely illusory. Resp. Br. 44. For example, in this case, the court of appeals held that Mr. Ngo had exhausted under the PLRA by filing a second appeal at the first formal level of review

that was rejected as untimely. Pet. App. 9; J.A. 31-35. That is, Mr. Ngo was found to have exhausted following an effort far more minimal than proceeding through all four levels of review mandated under California regulations.[3] Furthermore, Congress "believed there would be benefit to requiring the filing of a grievance" even when the specific relief sought by the inmate would not be granted, Resp. Br. 44, presumably because of the inherent value in the "fact of being heard" *on the merits* and "prompting administrative change" – neither of which results from the pro forma task of appealing the rejection of a grievance that was screened out on procedural grounds, *Booth*, 532 U.S. at 737.

E. The Habeas Analogy Favors Petitioners' Position Because the Policy Reasons Underlying this Court's Conclusion that the Federal-Habeas Exhaustion Requirement Compels Compliance With State Procedural Rules Are Similarly Present Here.

Petitioners do not suggest that the law of federal habeas is analogous in every respect to the present context, nor could they. *See* Resp. Br. 46. The habeas analogy supports Petitioners' position because this Court has found in that context that an exhaustion requirement, in order to have any force or effect, must be understood to require compliance with state filing deadlines and other procedural requirements. *Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000); *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). Moreover, it is ultimately because state procedural rules serve "important interests" that would be undermined if prisoners were permitted to routinely bypass

---

[3] If prison rules had not permitted Mr. Ngo to contest the rejection of his first grievance by filing a second appeal, presumably the Ninth Circuit would have held that Mr. Ngo had exhausted following the rejection of the initial appeal since he would have been able to "go no further in the prison's administrative system." Pet. App. 9.

them that this Court has held that the habeas exhaustion requirement compels compliance with those rules. *Coleman v. Thompson*, 501 U.S. 722, 745 (1991); *see also O'Sullivan*, 526 U.S. at 848; *Edwards*, 529 U.S. at 453. As in the habeas context, Congress enacted the PLRA's exhaustion mandate in order to protect what, in its judgment, are the important interests to be served by prison administrative procedures. *See Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). And as with the habeas exhaustion requirement, both this mandate and the interests that it is designed to serve would be wholly frustrated if inmates were permitted to "'exhaust' state remedies by spurning them." *Pozo v. McCaughtry*, 286 F.3d 1022, 1023 (7th Cir. 2002).

Furthermore, on a more particularized level, the habeas analogy is favorable to Petitioners' position because this Court's recognition that the exhaustion and procedural-default concepts are "inseparab[le]," *Edwards*, 529 U.S. at 452, is based in part on the comity considerations that counsel that the federal courts should afford the state courts a "full and fair opportunity" to address a prisoner's federal claim, *O'Sullivan*, 526 U.S. at 845 – considerations that similarly animate the PLRA's exhaustion requirement. Just as the states have a compelling interest in being afforded the chance to correct their own errors in the administration of justice, they similarly have an interest in not being bypassed in the correction of the internal problems of their prisons since those problems "involve issues so peculiarly within state authority and expertise." *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). Moreover, to the extent that this Court has located the procedural-default bar in the adequate-and-independent state ground doctrine, it has further explained that the doctrine's application in federal habeas is not jurisdictional, but is grounded in the same "concerns of comity and federalism" that underlie the statute's exhaustion requirement. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991); *see also Dretke v. Haley*, 541 U.S. 386, 392-93

(2004). Thus, the type of policy considerations that justify the rule that the federal-habeas-exhaustion mandate compels compliance with state procedural requirements are largely present under § 1997e(a).

By contrast, the statutory schemes at issue in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), and *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988), are not analogous to the PLRA's exhaustion provision. Resp. Br. 45-46. The commencement requirements of the ADEA and Title VII statutes, distinctly *unlike* the exhaustion requirement of § 1997e(a), have the circumscribed purpose of providing "state agencies a limited opportunity to settle . . . grievances . . . in a voluntary and localized manner." *Oscar Mayer*, 441 U.S. at 761. By contrast, Congress "set the bar a good deal higher in § 1997e(a)." *Thomas v. Woolum*, 337 F.3d 720, 756 (2003) (Rosen, J., dissenting in part and concurring in judgment). Section 1997e(a) *does* "stipulate an exhaustion requirement," *Oscar Mayer*, 441 U.S. at 761, and Congress intended to do much more with that mandate than give prison officials a "limited opportunity" to address inmate grievances on what is otherwise their inevitable path to federal court. Rather, Congress intended to alleviate the crushing burden of prisoner litigation on the federal courts by funneling prisoner complaints back into the administrative-review process, where they could be thoroughly investigated by prison officials with the goal that they would either be rectified or screened out.

F. Respondent's Various Policy Concerns Cannot Overcome Congress's Intent Under the PLRA's Exhaustion Requirement.

Respondent's reliance on "the long-standing principle that statutes should not be construed to give state authorities the ability to defeat federal civil rights claims by controlling statutes of limitations or procedural rules" is misplaced. Resp. Br. 28. The caselaw Respondent cites for this principle concerns *state* statutes that are "inconsistent with *Congress'* . . . aims." *Felder v. Casey*, 487 U.S. 131,

140 (1988) (emphasis added); Resp. Br. 28-29 (citing *Felder*, 487 U.S. at 138 (state notice-of-claim statute); *Wilson v. Garcia*, 471 U.S. 261, 279 (1985) (state limitations periods); *Burnett v. Grattan*, 468 U.S. 42, 50 (1984) (state administrative limitations period); and *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) (state immunity defense)). In this case, however, the PLRA is a statute that was enacted by *Congress*, and therefore it is Congress's aims with the PLRA that are dispositive. With the enactment of the PLRA, Congress has clearly manifested its intent to "place conditions on the vindication of a federal right," *Felder*, 487 U.S. at 147, by replacing the general rule of non-exhaustion under § 1983 with a general rule of exhaustion for all federal prisoner suits, including § 1983 actions. *See Porter v. Nussle*, 534 U.S. 516, 525 n.4 (2002). Therefore, unlike in *Felder*, where this Court held that the state-law requirement in question violated Congress's purposes in enacting § 1983, *Felder*, 487 U.S. at 147, the position advocated by Petitioners in this case is entirely consistent with Congress's separate purposes under § 1997e(a).

Furthermore, the language and history of § 1997e(a) support the conclusion that when Congress imposed the exhaustion mandate, it intended to afford the States discretion to establish governing rules of administrative procedure. Under the former version of § 1997e, Congress mandated that prison administrative remedies be "plain, speedy, and effective," and satisfy specified "minimum standards." 42 U.S.C. § 1997e(a), (b) (1994). By contrast, with the enactment of the PLRA, Congress repealed these federal-standards provisions, conditioning the exhaustion obligation solely on the requirement that administrative remedies be "available." 42 U.S.C. § 1997e(a) (2000). "It would be anomalous, to say the least, to refuse to give effect to the very rules that the PLRA encourages state prison authorities to enact." *Spruill v. Gillis*, 372 F.3d 218, 231 (3d Cir. 2004). It is not surprising that Congress would defer the establishment of administrative-review procedures to state prison officials in light of the "substantial

deference" that this Court itself accords to their "professional judgment" in determining the most appropriate means to accomplish legitimate state correctional goals.[4] *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *see also Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989).

Furthermore, Respondent's equation of an administrative-filing deadline with a statute of limitations is overstatement. Resp. Br. 29. Properly satisfying an administrative-filing deadline is invariably a far less demanding and complex task than filing a legally sufficient complaint. *See Burnett v. Grattan*, 468 U.S. 42, 50-51 (1984) (describing the numerous obligations required in initiating civil-rights litigation). Under California's regulations, for instance, an inmate need only "describe the problem and action requested." Cal. Code Regs. tit. 15, § 3084.2(a). Not surprisingly, therefore, in this case there is no suggestion in the record that Mr. Ngo's many-month delay in submitting an administrative appeal was attributable in any way to difficulties he confronted in complying with this requirement. Indeed, as Justice O'Connor observed in response to a similar argument from the concurrence in *Felder v. Casey*, "it would have been easier to file the required [appeal form] than to file this lawsuit, which [Respondent] proved himself quite capable of doing." 487 U.S. 131, 162 (1988) (O'Connor, J., joined by Rehnquist, C.J., dissenting).

---

[4] Respondent's citation to *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 762 (1979), for the proposition that Congress "could not have intended to consign federal lawsuits to the vagaries of diverse state limitations statutes" actually undermines Respondent's position. Resp. Br. 29 n.16. This is because this Court based this assessment of Congress's intent primarily on the fact that the statutory language at issue contained a commencement requirement, and did *not* "stipulate an exhaustion requirement." *Oscar Mayer*, 441 U.S. at 761.

Notwithstanding that Respondent's policy argument concerning the "potential for abuse" by prison administrators in fashioning administrative filing requirements bears no relation to the central question of congressional intent under the PLRA, this concern lacks merit. Resp. Br. 30. First, the assumption that prison officials would seize on the purported opportunity to create draconian filing deadlines ignores the fact that prisons themselves have an inherent interest in ensuring that inmates are able to fully avail themselves of the administrative-grievance process. Prompt notice of improper conditions and practices permits prison officials to take corrective action, thereby improving prison administration and reducing the likelihood of litigation. It also enables them to create factual records that are beneficial in settling claims or defending against them in court.* *See Porter*, 534 U.S. at 524-25. The circumstances surrounding the case of *Strong v. David*, 297 F.3d 646 (7th Cir. 2002), to which Respondent and his *amici* point as a "striking example" of prison officials using administrative rules to "torpedo prisoner claims on procedural grounds" in fact show no such thing. Resp. Br. 31; *see also* Law Professors' Br. 16-17. That state prison officials would wish to require factual details in prisoner grievances is eminently reasonable in light of the principal purposes of the administrative-appeals process in affording prison administrators the opportunity to investigate an inmate's claims, to create a factual record, and to obviate the need for litigation. If the requirement of factual specificity in administrative filings were indeed as onerous as Respondent and his *amici* suggest, presumably the Seventh Circuit would not have invited Illinois officials to establish such a requirement. *See Strong*, 297 F.3d at 650. Second, in many states, prison rules of administration are promulgated as state regulations or administrative codes. *See* Jerome N. Frank Br. 7-12 nn.5-13. In California, as state regulations, prison administrative rules are the product of a deliberative and public process that must conform to established legal requirements. *See* California Department of Corrections and Rehabilitation, Regulation and Policy

Management Branch, Correctional Standards Authority, http://www.cdcr.ca.gov/BudgetRegs/RPMB.html.

Respondent also offers up this case as a purported illustration of prison officials' improper application of procedural rules to eliminate a prisoner's claims by suggesting that Mr. Ngo's grievances were timely under a "continuing" violation theory because Mr. Ngo challenged "ongoing restrictions" on his activities. Resp. Br. 31 (internal quotation marks omitted). However, "normal [legal] principles" in fact demonstrate just the opposite. Resp. Br. 31. This Court has held that the "present effect[s]" of an alleged past illegal act do not prolong the life of a claim. *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (internal quotation marks omitted). Instead, for purposes of determining the commencement of a limitations period, "'[t]he proper focus is upon the time of the [unlawful] *acts*, not upon the time at which the *consequences* of the acts became most painful.'" *Id.* (emphasis in original) (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 209 (9th Cir. 1979)). In this case, the only act Mr. Ngo alleged with respect to the program-exclusion aspect of this action (as opposed to his separate claim that he was improperly placed in administrative segregation for a limited period) was the one-time decision on December 22, 2000 to restrict his access to certain prison programs, J.A. 4-8 – a decision that was made about six months before Mr. Ngo filed his first appeal on June 18, 2001.[5] J.A. 26-28; *see Ricks*, 449 U.S. at 257-58 (holding that the plaintiff's discriminatory-discharge action was untimely

---

[5] In his second appeal, submitted June 25, 2001, Mr. Ngo contended that he sought "informal resolution" of his program-exclusion claim by "writing to" Defendant Kane on March 20, 2001. J.A. 34. However, even if Defendant Kane's April 13, 2001 response to Mr. Ngo's inquiry were to constitute a separate "act" triggering anew the running of the administrative-filing period, Mr. Ngo's first appeal was still over a month-and-a-half too late. *See* J.A. 30-31.

because the complaint failed to allege any unlawful acts that occurred within the applicable limitations period).

Respondent's additional policy concern that it would be particularly unfair to hold prisoners to procedural requirements because they are laymen in the law, Resp. Br. 32-33, cannot be reconciled with this Court's rule that actions in federal habeas – in which the inmate's liberty, and possibly life, are at stake – may be forfeited by a state procedural default even though there is no constitutional right to counsel in such proceedings. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 727, 757 (1991) (holding that an inmate facing a death sentence had procedurally defaulted his federal-habeas action by missing state appeal deadline by three days). Furthermore, the fact that Congress has mandated exhaustion under the PLRA demonstrates that it was Congress's considered judgment that the objectives to be achieved through such a requirement in the specific context of federal prisoner litigation outweighed any possible competing policy considerations.

Finally, Respondent's argument that Congress must have intended to permit untimely exhaustion under the PLRA because of Congress's previously evidenced concern in the CRIPA for the "fairness and adequacy" of state procedures fails to account for Congress's predominant motivation in enacting the new exhaustion mandate. Resp. Br. 34. Under the PLRA, Congress sought to entirely revamp § 1997e in order to "reduce the quantity and improve the quality of prisoner suits" by redirecting inmate grievances from the courts back into the administrative-review process where prison officials would have the time and opportunity to thoroughly evaluate and respond to those grievances and thereby obviate the need for litigation. *Porter*, 534 U.S. at 524-25. An exhaustion rule requiring compliance with state filing deadlines directly facilitates those objectives, whereas the rule of untimely "exhaustion" advocated by Respondent thwarts them.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
MANUEL M. MADEIROS
State Solicitor General
JAMES M. HUMES
Chief Assistant Attorney General
FRANCES T. GRUNDER
Senior Assistant Attorney General
THOMAS S. PATTERSON
Supervising Deputy Attorney General
JENNIFER G. PERKELL
Deputy Attorney General
Counsel of Record
State Bar No. 203205
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5726
Fax: (415) 703-5843
Counsel for Petitioners

(6)

FILED
DEC 30 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-416

In the Supreme Court of the United States

JEANNE S. WOODFORD, ET AL., PETITIONERS

v.

VIET MIKE NGO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DAN HIMMELFARB
Assistant to the Solicitor General

BARBARA L. HERWIG
ISAAC J. LIDSKY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a prisoner satisfies the exhaustion requirement of the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a), by filing an untimely or otherwise procedurally defective administrative appeal.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 6
Argument:
A prisoner does not satisfy the PLRA's exhaustion requirement by filing an untimely or otherwise procedurally defective administrative appeal 9
A. The Ninth Circuit's decision is inconsistent with the text of the PLRA 9
B. The Ninth Circuit's decision is inconsistent with the history of the PLRA 18
C. The Ninth Circuit's decision is inconsistent with the purposes of the PLRA 20
D. The Ninth Circuit's decision cannot be justified by the policy considerations on which it relied ... 28
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Alexander v. *Hawk*, 159 F.3d 1321 (11th Cir. 1998) 23
Bejar v. *Ashcroft*, 324 F.3d 127 (3d Cir. 2003) 12
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 18
Blum v. *Stenson*, 465 U.S. 886 (1984) 30
Booth v. *Churner*, 532 U.S. 731 (2001) 2, 3, 7, 8, 9, 19, 20, 21, 29
Brewer v. *Mullin*, 130 Fed. Appx. 264 (10th Cir. 2005) .. 14
Coleman v. *Thompson*, 501 U.S. 722 (1991) 12
Conroy v. *Aniskoff*, 507 U.S. 511 (1993) 19

Cases—Continued: Page

Cunningham v. *Railroad Ret. Bd.*, 392 F.3d 567 (3d Cir. 2004) 11
EEOC v. *Commercial Office Prods. Co.*, 486 U.S. 107 (1988) 6, 16, 17
Edwards v. *Carpenter*, 529 U.S. 446 (2000) 12, 13, 29
Enriquez-Alvarado v. *Ashcroft*, 371 F.3d 246 (5th Cir. 2004) 11
Evans v. *United States*, 504 U.S. 255 (1992) 10
Flakes v. *Frank*, No. 04-C-189-C, 2005 WL 1276370 (W.D. Wis. May 26, 2005) 15
Galvez Piñeda v. *Gonzales*, 427 F.3d 833 (10th Cir. 2005) 10, 11
Gilmore v. *University of Rochester Strong Mem'l Hosp. Div.*, 384 F. Supp. 2d 602 (W.D.N.Y. 2005) 17
Gutierrez v. *Railroad Ret. Bd.*, 918 F.2d 567 (6th Cir. 1990) 11
Hornel v. *Helvering*, 312 U.S. 552 (1941) 10
Johnson v. *Meadows*, 418 F.3d 1152 (11th Cir. 2005), petition for cert. pending, No. 05-6336 (filed Sept. 8, 2005) 9, 22, 23, 26
Lewis v. *Casey*, 518 U.S. 343 (1996) 15
Mahoney v. *Railroad Ret. Bd.*, 194 F.2d 752 (7th Cir. 1952) 11
McCarthy v. *Madigan*, 503 U.S. 140 (1992) 2, 7, 18, 19, 20, 26, 28, 29
NLRB v. *Saint-Gobain Abrasives, Inc.*, 426 F.3d 455 (1st Cir. 2005) 11
O'Sullivan v. *Boerckel*, 526 U.S. 838 (1999) 7, 12, 13, 25

Cases—Continued: Page

Oscar Mayer & Co. v. *Evans*, 441 U.S. 750 (1979) 6, 16, 17
Pennsylvania v. *Finley*, 481 U.S. 551 (1987) 29
Petroleum Communications, Inc. v. *FCC*, 22 F.3d 1164 (D.C. Cir. 1994) 11
Porter v. *Nussle*, 534 U.S. 516 (2002) 1, 2, 3, 8, 9, 19, 20, 21, 22
Pozo v. *McCaughtry*, 286 F.3d 1022 (7th Cir.), cert. denied, 537 U.S. 949 (2002) 9, 10, 12, 21, 22, 23
Preiser v. *Rodriguez*, 411 U.S. 475 (1973) 15
Procunier v. *Martinez*, 416 U.S. 396 (1974), overruled in part on other grounds by *Thornburg* v. *Abbott*, 490 U.S. 401 (1987) 8, 22
Ross v. *County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004) 9, 12, 22, 23
Schacht v. *United States*, 398 U.S. 58 (1970) 26
Sims v. *Apfel*, 530 U.S. 103 (2000) 11
Spruill v. *Gillis*, 372 F.3d 218 (3d Cir. 2004) 9, 12, 22, 23, 24
Sswajje v. *Ashcroft*, 350 F.3d 528 (6th Cir. 2003) 12
Thomas v. *Woolum*, 337 F.3d 720 (6th Cir. 2003) ..... *passim*
Unemployment Comp. Comm'n v. *Aragon*, 329 U.S. 143 (1946) 10
United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952) 7, 10
United States v. *Wells*, 519 U.S. 482 (1997) 19
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 25

Cases—Continued: Page

Williams v. *Comstock*, 425 F.3d 175 (2d Cir. 2005) 9
Wilwording v. *Swenson*, 404 U.S. 249 (1971) 2
Wudtke v. *Davel*, 128 F.3d 1057 (7th Cir. 1997) 26

Statutes, regulations and rule:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 16
29 U.S.C. 633(b) 16, 17
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 16
42 U.S.C. 2000e-5(e)(1) 16
Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 2
§ 7(a), 94 Stat. 352 2
§ 7(a)(1), 94 Stat. 352 ..... 18, 19, 20
Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a) 1, 3, 5, 9, 10, 22
8 U.S.C. 1252(d)(1) 11
28 U.S.C. 1915(g) 20
28 U.S.C. 2254(b)(1) 5
28 U.S.C. 2254(b)(1)(A) 5, 12
28 U.S.C. 2254(d) 6, 14
42 U.S.C. 1983 ..... 2, 4, 14
45 U.S.C. 355(f) 11

Regulations and rule—Continued: Page

28 C.F.R.:
Section 542.10 *et seq.* 1
Section 542.14 1
Section 542.14(a) 29
Section 542.14(b) 27
Section 542.15 1
Section 542.15(a) 27, 29
Cal. Code Regs. tit. 15 (2002):
§ 3084.3(c)(6) 4, 27
§ 3084.5(a)-(e) 5
§ 3084.5(a)(3)(B) 15
§ 3084.6(c) 4
Md. Regs. Code tit. 12, § 12.07.01.06(F) (2004) 27
Ohio Admin. Code (2002):
§ 5120:9-31(J)(2) 27
§ 5120:9-31(J)(3) 27
Wis. Admin. Code DOC (2005):
§ 310.09(6) 27
§ 310.13(2) 27
Fed. R. Civ. P. 3 17

Miscellaneous:

141 Cong. Rec. (1995):
p. 4275 3
pp. 14,572-14,573 28
p. 26,548 ..... 2, 28
p. 26,553 24

Miscellaneous—Continued: Page

pp. 26,553-26,554 24
p. 35,623 19
p. 35,624 3
Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 10
H.R. Rep. No. 21, 104th Cong., 1st Sess. (1995) 3
Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing Before the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) 10
Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. Pa. L. Rev. 639 (1993) 2
Webster's Third New International Dictionary (1993) 13

In the Supreme Court of the United States

No. 05-416

JEANNE S. WOODFORD, ET AL., PETITIONERS

v.

VIET MIKE NGO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether a prisoner satisfies the exhaustion requirement of the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(a), by filing an untimely or otherwise procedurally defective administrative appeal. The United States has a substantial interest in the resolution of that question. Pursuant to its authority to manage federal prisons, the Bureau of Prisons (BOP) has adopted an administrative remedy program through which inmates may seek review of issues relating to their confinement. See 28 C.F.R. 542.10 *et seq.* That program imposes time limitations and other procedural requirements on the filing of administrative claims. See 28 C.F.R. 542.14, 542.15. Inmates frequently name BOP officials as defendants in actions arising from conditions of confinement in federal correctional institutions, and the PLRA's exhaustion requirement applies to those suits. See *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002). The Court's decision in this case will therefore affect both the efficacy of the BOP's administrative remedy program and the

conduct of litigation against BOP officials. The United States participated as an amicus curiae in each of this Court's prior cases addressing the proper interpretation of the PLRA's exhaustion provision. *Porter*, *supra*; *Booth* v. *Churner*, 532 U.S. 731 (2001).

STATEMENT

1. "Litigation challenging the conditions and practices in prisons * * * is a relatively recent phenomenon. Until the 1960s, courts adopted a 'hands-off' approach to prison cases." Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. Pa. L. Rev. 639, 659 (1993). When prisoner litigation first began to proliferate, state prisoners alleging constitutional violations were not required to exhaust administrative remedies before filing suit in federal court. See *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971) (per curiam). That rule was changed in 1980, when Congress enacted the Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247, 94 Stat. 349, which included a "limited exhaustion requirement" for prisoner suits, *McCarthy* v. *Madigan*, 503 U.S. 140, 150 (1992). The CRIPA authorized a district court to stay an action under 42 U.S.C. 1983 for a specified period while the prisoner exhausted "such plain, speedy, and effective administrative remedies as are available," but only if the administrative remedies met certain federal standards and the court believed that exhaustion was "appropriate and in the interests of justice." CRIPA § 7(a), 94 Stat. 352. The rule was changed again in 1996, when Congress enacted the PLRA, which "address[ed] the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners." 141 Cong. Rec. 26,548 (1995) (statement of Sen. Dole). The PLRA addressed that problem in a number of

ways, including by "invigorat[ing] the exhaustion prescription." *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002).[1]

The PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). That exhaustion provision "differs markedly" from the CRIPA's. *Porter*, 534 U.S. at 524. Exhaustion is now mandatory rather than discretionary; a prisoner must now exhaust all available remedies, not just those that meet federal standards and are "plain, speedy, and effective"; and the requirement now applies to federal as well as state prisoners. See *ibid.* This Court has interpreted the PLRA's exhaustion provision in two recent cases, unanimously rejecting, on both occasions, narrow interpretations of that provision as inconsistent with Congress's intent. See *Booth* v. *Churner*, 532 U.S. 731 (2001) (prisoner seeking only money damages must exhaust administrative remedies that provide some form of relief, even if they do not provide monetary relief); *Porter*, *supra* (exhaustion requirement applies to all suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong).

2. Respondent is a California prisoner who is serving a life sentence. In October 2000, while incarcerated at San Quentin State Prison, he was placed in administrative segre-

---

[1] See H.R. Rep. No. 21, 104th Cong., 1st Sess. 7 (1995) (bill "addresses the problem of frivolous [prisoner] lawsuits" by, *inter alia*, "requir[ing] that all administrative remedies be exhausted prior to a prisoner initiating a civil rights action in court"); 141 Cong. Rec. at 4275 (statement of Rep. Canady) (bill "significantly curtail[s] the ability of prisoners to bring frivolous and malicious lawsuits by forcing prisoners to exhaust all administrative remedies before bringing suit in Federal court"); *id.* at 35,624 (statement of Rep. LoBiondo) ("[a]n exhaustion requirement * * * would aid in deterring frivolous claims") (quoting letter from former Attorney General Richard Thornburgh).

gation for engaging in "inappropriate activity" with volunteer priests. In December 2000, he was returned to the general population, but, as a consequence of the "inappropriate activity," his participation in certain programs was limited and he was prohibited from corresponding with a former San Quentin Catholic Chapel volunteer. Approximately six months later, in June 2001, respondent appealed that disciplinary action to prison officials. The prison's appeals coordinator rejected the appeal as untimely, because respondent had not filed it within 15 working days of the action being challenged, as the applicable California regulations require. Approximately one week later, respondent filed a second appeal, which was also rejected as untimely. Pet. App. 2-3, 23.[2]

3. Respondent then sued petitioners and other prison officials under 42 U.S.C. 1983 in the United States District Court for the Northern District of California, challenging the same disciplinary action that was the subject of his untimely administrative grievance. Pet. App. 3, 22-23. Respondent alleged violations of his free-speech, free-exercise, and due-process rights, and also asserted a claim of defamation under state law. *Ibid.* The district court granted the defendants' motion to dismiss. *Id.* at 22-26. It held that respondent had not "fully exhausted his administrative remedies," as the PLRA requires, because there are "several levels of appeal" within the California prison system and respondent had not proceeded beyond the first level. *Id.* at 24-25.[3]

---

[2] The regulations provide that a prisoner "must submit [an] appeal within 15 working days of the event or decision being appealed," and that "[a]n appeal may be rejected" when the "[t]ime limits for submitting the appeal are exceeded" and the prisoner "had the opportunity to file within the prescribed time constraints." Cal. Code Regs. tit. 15, §§ 3084.6(c), 3084.3(c)(6) (2002).

[3] The levels of appeal established by the regulations are (1) the "informal level," at which the prisoner and staff involved in the action "attempt to resolve the grievance informally"; (2) the "first formal level," at which the decision is made by other staff; (3) the "second formal level," at which the decision is made by the head of the institution or the regional parole administrator; and (4) the

4. The court of appeals reversed. Pet. App. 1-21. The court first held that "[t]he PLRA requires prisoners to exhaust all *available* remedies" and that respondent satisfied that requirement, because "he could go no further in the prison's administrative system" and thus "no remedies remained available to him." Pet. App. 9. The court then turned to petitioners' argument that respondent's failure to comply with the administrative filing deadlines constituted a failure to exhaust. The court rejected that argument, on the ground that it "confuses the doctrines of exhaustion and procedural default," *ibid.*, and held, instead, that "an untimely administrative appeal satisfies the PLRA's exhaustion requirement," *id.* at 11.

The court of appeals acknowledged that, under 28 U.S.C. 2254(b)(1)(A), a state prisoner petitioning for a writ of habeas corpus must exhaust available state-court remedies, and that this Court has interpreted that exhaustion requirement to encompass a procedural-default element that bars a state prisoner from filing a habeas corpus petition "even though he has technically exhausted his claims with an untimely habeas petition filed in state court." Pet. App. 14. The court of appeals concluded, however, that the PLRA's exhaustion provision should be interpreted differently. The court reasoned that a State's sovereignty is "less threatened" when a federal court reviews an action taken by a state prison than when it reviews a state court's criminal judgment. *Ibid.* The court also relied (*id.* at 15) on the fact that, whereas a state prisoner may not file a habeas corpus petition "unless" state-court remedies have been exhausted, 28 U.S.C. 2254(b)(1), a state prisoner may not file a Section 1983 action "until" administrative remedies have been exhausted, 42 U.S.C. 1997e(a). Finally, the court observed that, unlike the habeas corpus statute, which provides a standard for reviewing "state

---

"third formal level," at which the decision is made by the Director of the Department of Corrections. Cal. Code Regs. tit. 15, § 3084.5(a)-(e) (2002).

court rulings on issues of fact and law," the PLRA "has no language instructing courts how to treat administrative findings." Pet. App. 15 (citing 28 U.S.C. 2254(d)).

The court of appeals rejected the contention that allowing a lawsuit to proceed despite the failure to make a timely request for administrative relief would remove the incentive for prisoners to file timely administrative claims, and thereby defeat the PLRA's objective of giving prison officials the first opportunity to resolve inmate grievances. The court believed that prisoners would continue to file timely claims, because administrative claims provide them with "an additional attempt to win a favorable ruling" and "the fastest route to a remedy." Pet. App. 16-17. The court also believed that, even if prisoners did not file timely claims, prison officials would still have the opportunity to resolve inmate grievances if they chose to consider the untimely claims.

Instead of construing the PLRA in the same manner that this Court has construed the habeas corpus statute, the court of appeals looked to cases involving claims in the employment context. See Pet. App. 18 (discussing *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979) (Age Discrimination in Employment Act of 1967), and *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107 (1988) (Title VII of the Civil Rights Act of 1964)). The court believed that those cases stand for the proposition that "administrative exhaustion does not include a procedural default component." Pet. App. 18. The court also believed that requiring timely exhaustion of administrative remedies would "penalize the less sophisticated and less informed" (*id.* at 19) and give prison administrators "an incentive to fashion grievance procedures which prevent or even defeat prisoners' meritorious claims" (*id.* at 21).

SUMMARY OF ARGUMENT

A prisoner does not satisfy the PLRA's exhaustion requirement by filing an untimely or otherwise procedurally defective administrative appeal.

The Ninth Circuit's contrary decision is inconsistent with the PLRA's text. In the contexts in which the term "exhaustion" is most commonly employed—administrative law and habeas corpus—it is well-settled that the exhaustion of remedies means the *proper* exhaustion of remedies, including compliance with applicable filing deadlines. For example, this Court has made clear that an administrative decision should not be overturned unless the agency "erred against objection made at the time appropriate under its practice." *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). The Court has likewise made clear that, to "protect the integrity of the federal exhaustion rule" in habeas corpus cases, a court asks "not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts." *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 848 (1999) (internal quotation marks and citation omitted). The settled meaning of "exhaustion" in the contexts most analogous to the one here is therefore *proper* exhaustion, and under established principles of statutory construction, that is the meaning that Congress should be presumed to have intended when it used the term in the PLRA.

The Ninth Circuit's decision is also inconsistent with the PLRA's history. In *McCarthy* v. *Madigan*, 503 U.S. 140 (1992), a pre-PLRA case, this Court declined to adopt an exhaustion requirement for suits by federal prisoners. The exhaustion rule in effect at the time was "limited," *id.* at 150, and applied only to state prisoners. In declining to adopt a requirement that was both stricter and applicable to federal as well as state prisoners, the Court in *McCarthy* assumed that, if either Congress or the Court *were* to adopt such a requirement (as Congress subsequently did in enacting the PLRA), it would not be satisfied if an inmate's administrative claim was denied as untimely. See *id.* at 150, 152-153. As this Court has recognized, the PLRA's exhaustion provision must be read in light of *McCarthy*, see *Booth* v. *Churner*, 532 U.S.

731, 739-741 (2001), and Congress should therefore be understood to have enacted the exhaustion requirement that this Court identified, but declined to adopt, in that case, cf. *id.* at 740.

Finally, the Ninth Circuit's decision is inconsistent with the PLRA's purposes. As this Court has recognized, Congress had three principal objectives in mind when it enacted the exhaustion requirement: enabling prisoners to obtain relief in the administrative process, thereby obviating the need for litigation; filtering out frivolous claims; and creating an administrative record. *Porter* v. *Nussle*, 534 U.S. 516, 525 (2002). The Ninth Circuit's rule frustrates each of those objectives. Cf. *id.* at 528. If the untimely filing of an administrative claim is not a bar to suit, prisoners will have little incentive to comply with limitation periods, the number of untimely claims will increase, and fewer administrative claims will be decided on the merits. In addition, allowing claims to reach federal court without having been timely presented to prison officials will increase the number of cases in which courts are acting as "the front-line agencies" for the resolution of prisoner complaints, a task for which they are "ill suited," *Procunier* v. *Martinez*, 416 U.S. 396, 405 n.9 (1974), overruled in part on other grounds by *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989); it will reduce inmates' incentive to bring dangerous conditions and abusive practices to the immediate attention of prison authorities; it will result in prisoners' naming their guards as defendants in more lawsuits, thereby exacerbating the tension that already exists in prisons; and it will damage the integrity of prison administration by allowing prisoners to ignore the requirements of grievance systems.

ARGUMENT

A PRISONER DOES NOT SATISFY THE PLRA'S EXHAUSTION REQUIREMENT BY FILING AN UNTIMELY OR OTHERWISE PROCEDURALLY DEFECTIVE ADMINISTRATIVE APPEAL

The PLRA prohibits an inmate from bringing an action that challenges prison conditions "until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). In two recent decisions, this Court has recognized the breadth of that provision. See *Porter* v. *Nussle*, 534 U.S. 516 (2002); *Booth* v. *Churner*, 532 U.S. 731 (2001). The question presented in this case is whether a prisoner satisfies the PLRA's exhaustion requirement by filing an untimely or otherwise procedurally defective administrative appeal. As the majority of the courts of appeals to consider the question have held, the answer is no.[4] The Ninth Circuit's contrary conclusion is inconsistent with the PLRA's text, history, and purposes, and the policy considerations on which the Ninth Circuit relied cannot justify its decision.

A. The Ninth Circuit's Decision Is Inconsistent With The Text Of The PLRA

The legal contexts in which the term "exhaustion" of remedies is most commonly employed, and which are closest to the context of prison litigation, are (1) administrative law and (2) habeas corpus. As explained below, the term in those contexts refers to the *proper* exhaustion of remedies. That is

---

[4] See *Williams* v. *Comstock*, 425 F.3d 175 (2d Cir. 2005) (per curiam); *Johnson* v. *Meadows*, 418 F.3d 1152 (11th Cir. 2005), petition for cert. pending, No. 05-6336 (filed Sept. 8, 2005); *Spruill* v. *Gillis*, 372 F.3d 218 (3d Cir. 2004) (Becker, J.); *Ross* v. *County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004); *Pozo* v. *McCaughtry*, 286 F.3d 1022 (7th Cir.) (Easterbrook, J.), cert. denied, 537 U.S. 949 (2002). Only the Ninth Circuit, in this case, and the Sixth Circuit, in *Thomas* v. *Woolum*, 337 F.3d 720 (2003), have reached a contrary conclusion, and the Sixth Circuit did so over a forceful dissent, *id.* at 737-757 (opinion of Rosen, J.).

therefore the meaning that Congress should be presumed to have intended when it enacted the PLRA. "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Evans* v. *United States*, 504 U.S. 255, 260 n.3 (1992) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

1. The PLRA provision at issue requires the exhaustion of "administrative remedies." 42 U.S.C. 1997e(a). As the court of appeals recognized (Pet. App. 6), Congress enacted the provision to bring the exhaustion requirement for prisoner suits "into line with administrative exhaustion rules that apply in other contexts." *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 20 (1995) (statement of John R. Schmidt, Associate Attorney General). In "a variety" of other contexts analogous to this one, "untimely filings with administrative agencies do not constitute exhaustion of administrative remedies." *Galvez Piñeda* v. *Gonzales*, 427 F.3d 833, 838 (10th Cir. 2005). As Judge Easterbrook has explained, the concept of "exhaustion" in administrative law "means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)." *Pozo* v. *McCaughtry*, 286 F.3d 1022, 1024 (7th Cir.), cert. denied, 537 U.S. 949 (2002).

That description of the law is consistent with decisions of this Court going back more than half a century. In *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952), for example, the Court stated a "general rule" of administrative procedure that has been frequently quoted since. "[C]ourts should not topple over administrative decisions," this Court said, "unless the administrative body not only has erred but has erred *against objection made at the time appropriate under its practice*." *Id.* at 37 (emphasis added). See also *Unemployment Comp. Comm'n* v. *Aragon*, 329 U.S. 143, 155 (1946); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941).

That "waiver principle"—the "ordinary principle[] of administrative law" that "a reviewing court will not consider arguments that a party failed to raise in timely fashion before an administrative agency"—has been described as an "ordinary 'exhaustion' or 'waiver' rule" and as one of "the basic 'exhaustion of remedies' rules." *Sims* v. *Apfel*, 530 U.S. 103, 114, 115, 118 (2000) (Breyer, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting).[5] Indeed, the language in *L.A. Tucker Lines* quoted above has been described as a statement of the exhaustion requirement itself. See, *e.g.*, *NLRB* v. *Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 458-459 (1st Cir. 2005); *Petroleum Communications, Inc.* v. *FCC*, 22 F.3d 1164, 1169 (D.C. Cir. 1994).

Consistent with that principle, statutes that require "administrative remedies" to be "exhausted" have been interpreted to require the *timely* presentation of claims to the agency. For example, 45 U.S.C. 355(f) provides that a benefits claimant may obtain judicial review of a final decision of the Railroad Retirement Board "only after all administrative remedies within the Board will have been availed of and exhausted," and the courts of appeals have uniformly concluded that that requirement is not satisfied if an administrative claim is rejected as untimely, see *Cunningham* v. *Railroad Ret. Bd.*, 392 F.3d 567, 572 (3d Cir. 2004); *Gutierrez* v. *Railroad Ret. Bd.*, 918 F.2d 567, 570 (6th Cir. 1990); *Mahoney* v. *Railroad Ret. Bd.*, 194 F.2d 752, 754-755 (7th Cir. 1952). Likewise, 8 U.S.C. 1252(d)(1) provides that a court may review a final order of removal "only if * * * the alien has exhausted all administrative remedies available to the alien as of right," and the courts of appeals have uniformly concluded that that requirement is not satisfied if an administrative claim is rejected as untimely, see, *e.g.*, *Galvez Piñeda*, 427 F.3d at 838; *Enriquez-Alvarado* v. *Ashcroft*, 371 F.3d 246,

[5] While the quoted language appeared in the dissenting opinion in *Sims*, "the Court [was] unanimous" on that "principle of administrative law." 530 U.S. at 112 (O'Connor, J., concurring in part and concurring in the judgment).

248 (5th Cir. 2004); *Sswajje* v. *Ashcroft*, 350 F.3d 528, 532 (6th Cir. 2003); *Bejar* v. *Ashcroft*, 324 F.3d 127, 132 (3d Cir. 2003).

2. a. The habeas corpus statute also has an exhaustion provision. It states, in relevant part, that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that * * * the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. 2254(b)(1)(A). As the court of appeals recognized, while "the habeas exhaustion requirement under § 2254 does not specifically mention procedural default," this Court has "grafted procedural default onto § 2254's exhaustion requirement"; there has, in effect, been a "merger of exhaustion with procedural default." Pet. App. 14. Accord *Spruill* v. *Gillis*, 372 F.3d 218, 228-229 (3d Cir. 2004); *Ross* v. *County of Bernalillo*, 365 F.3d 1185-1186 (10th Cir. 2004); *Thomas* v. *Woolum*, 337 F.3d 720, 745-751 (6th Cir. 2003) (Rosen, J., dissenting in part); *Pozo*, 286 F.3d at 1024.

As this Court has explained, the exhaustion requirement for habeas corpus cases "is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts." *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 845 (1999). The Court has made clear that that purpose would be "utterly defeated" if a state prisoner could obtain federal habeas corpus review either by "'letting the time run' so that state remedies were no longer available" or by "*present[ing]* his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it." *Edwards* v. *Carpenter*, 529 U.S. 446, 453 (2000) (quoting *Boerckel*, 526 U.S. at 848). In either circumstance, "habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims." *Coleman* v. *Thompson*, 501 U.S. 722, 732 (1991). "To avoid this result, and thus protect the integrity of the federal exhaustion rule," this Court "ask[s] not only whether a prisoner has exhausted

his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts." *Boerckel*, 526 U.S. at 848 (internal quotation marks and citation omitted). In requiring the *proper* exhaustion of state-court remedies, the Court has made clear that the procedural-default rule "accompanies" the habeas corpus statute's exhaustion requirement, and that the two are "inseparab[le]." *Carpenter*, 529 U.S. at 452.

b. Except insofar as one requires exhaustion of administrative remedies, while the other requires exhaustion of state-court remedies, the PLRA's exhaustion provision is essentially identical to that of the habeas corpus statute. The Ninth Circuit nevertheless believed that the two provisions should be interpreted differently. That was error.

The court of appeals relied on the fact that, unlike the habeas corpus statute, which precludes relief "unless" other remedies have been exhausted, the PLRA precludes suit "until" other remedies have been exhausted. Pet. App. 15. But this Court has never suggested that the "inseparability of the exhaustion rule and the procedural-default doctrine," *Carpenter*, 529 U.S. at 452, is dependent on the conjunction "unless." Instead, the Court has relied on the fact that the purpose of the exhaustion requirement—giving state courts "a full and fair opportunity" to resolve federal claims, *Boerckel*, 526 U.S. at 845—would be "utterly defeated," *Carpenter*, 529 U.S. at 453, if exhaustion did not mean *proper* exhaustion.

In any event, the PLRA's use of "until," rather than "unless," does not support the Ninth Circuit's view that the PLRA's exhaustion provision merely "defers," and cannot "bar[]," a federal suit. Pet. App. 15. "Until" means "before the time that," *Webster's Third New International Dictionary* 2513 (1993); "unless" means "except on the condition that," *id.* at 2503. That a suit may not be filed "before the time that" other remedies are exhausted encompasses the possibility that the time of exhaustion will never arrive. That is the same as saying that "the condition" of exhaustion will

not be satisfied. There is therefore no basis for concluding that Congress meant to depart from the background rule of exhaustion in the administrative law and habeas corpus contexts simply because it used "until" rather than "unless."

The Ninth Circuit also thought it relevant that, unlike the habeas corpus statute, which provides "a standard of review for collateral re-examination of state court rulings on issues of fact and law," the PLRA has "no language instructing courts how to treat administrative findings." Pet. App. 15. But that distinction has no bearing on the issue of exhaustion. The provision of the habeas corpus statute relied upon by the court of appeals—28 U.S.C. 2254(d)—presumes that the federal claim has been "adjudicated on the merits in State court," and requires federal courts to accord deference to that adjudication unless the state court's decision was unreasonable. The habeas corpus statute contains no provision addressing the deference due to a state court's determination that a claim was untimely (which, in any event, will usually be undisputed). Thus, even assuming that, in determining that respondent's appeal was untimely, the prison's appeals coordinator resolved a "difficult legal issue," Pet. App. 15, the fact that "nothing in the PLRA directs federal courts to defer to such a legal conclusion," *ibid.*, does not distinguish the PLRA from the habeas corpus statute.[6]

The question whether a federal court must defer to a prison's interpretation of its regulations, moreover, is likely to arise even under the Ninth Circuit's interpretation of the PLRA. Timeliness aside, it is undisputed that *all* available administrative remedies must be exhausted, see Pet. App. 17, and there are likely to be cases in which an administrative claim is denied because the prisoner skipped a step in the process, see, *e.g.*, *Brewer* v. *Mullin*, 130 Fed. Appx. 264, 265-

[6] There is no reason for the PLRA to have a provision, like 28 U.S.C. 2254(d), that addresses the deference due to a prison administrator's decision on the *merits* of a grievance claim, because, as in other *Bivens* and Section 1983 actions, constitutional claims in prisoner suits are decided *de novo*.

266 (10th Cir. 2005); *Flakes* v. *Frank*, No. 04-C-189-C, 2005 WL 1276370, at *3 (W.D. Wis. May 26, 2005), and the federal court must decide how much deference, if any, should be given to the prison's determination of what the grievance procedure required. For example, California's regulations provide that an inmate need not seek relief at the "informal level" when the matter involves a "[s]erious disciplinary infraction[]" (Cal. Code Regs. tit. 15, § 3084.5(a)(3)(B)), and prison officials may deny relief to an inmate who did not seek relief at the informal level based on the conclusion that the matter at issue was not a serious disciplinary infraction.

Finally, the Ninth Circuit believed that the exhaustion provisions of the PLRA and habeas corpus statute should be interpreted differently because "[a] state's sovereignty" is "less threatened" when a federal court reviews an action taken by a state prison than when it reviews a criminal judgment of a state court. Pet. App. 14. Indeed, the court of appeals went so far as to say that interpreting the PLRA's exhaustion provision to require the timely presentation of administrative claims would serve "neither the interests of federalism nor comity." *Id.* at 19. That view is flatly contradicted by *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), where this Court explained that it is "difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Id.* at 491-492. For that reason, the Court stressed that States "have an important interest in not being bypassed in the correction of [the internal] problems" of their prisons, and that "[t]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors * * * also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Id.* at 492. Accord, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 362 (1996).

3. In holding that the PLRA authorizes untimely exhaustion, the Ninth Circuit, like the Sixth Circuit, see *Thomas*, 337 F.3d at 727-730, relied principally (Pet. App. 18) on this Court's decisions in *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979), and *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107 (1988). Those cases arose in the employment context and thus are far removed from the concerns that Congress was addressing in the PLRA. They provide no basis for concluding that Congress intended to depart from the background rule in the contexts of administrative law and habeas corpus—*i.e.*, that exhaustion means *proper* exhaustion.

Oscar Mayer involved a provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, that precludes the filing of suit "before the expiration of sixty days after proceedings have been commenced under [a] State law" prohibiting discrimination in employment. 29 U.S.C. 633(b). The Court held that a plaintiff's failure to comply with the statute of limitations for the state claim does not bar the federal suit. 441 U.S. at 758-765. *Commercial Office Products* involved a provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, that requires the filing of a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the challenged employment practice, except that, when proceedings have been instituted with a state or local agency with authority to grant or seek relief from an unlawful employment practice, a charge must be filed with the EEOC within 300 days of the challenged employment practice. 42 U.S.C. 2000e-5(e)(1). The Court held that the 300-day period is applicable even if the state or local proceedings were not timely commenced. 486 U.S. at 122-124.

Contrary to the Ninth Circuit's assertion, this Court did not state in either *Oscar Mayer* or *Commercial Office Products* that "administrative exhaustion does not include a procedural default component." Pet. App. 18. Nor does either case support the view that a statute requiring that remedies be

"exhausted" should not be interpreted to require the timely presentation of claims to the agency (or state court), because the statutory provisions at issue in those cases do not require exhaustion of state remedies. In *Oscar Mayer*, the Court explicitly stated that the ADEA provision at issue "does not stipulate an exhaustion requirement," 441 U.S. at 761, and in *Commercial Office Products*, which involved a provision of Title VII that bears even less resemblance to an exhaustion-of-state-remedies requirement, the Court largely relied on *Oscar Mayer*, see 486 U.S. at 123-124.[7] The decision in *Oscar Mayer* rested, not on an interpretation of the term "exhausted," or even on general principles of exhaustion, but mainly on specific features of the ADEA provision that do not appear in the PLRA.[8]

---

[7] Insofar as the provision at issue in *Commercial Office Products* is an exhaustion provision, it requires the exhaustion of federal (not state) remedies, and, consistent with the ordinary rule, it requires their exhaustion to be *timely*. "In general, the filing of an untimely charge [with the EEOC] will not suffice for purposes of the exhaustion requirement." *Gilmore* v. *University of Rochester Strong Mem'l Hosp. Div.*, 384 F. Supp. 2d 602, 607 (W.D.N.Y. 2005) (citing cases).

[8] The first feature is the word "commenced," which, the Court explained, "strongly implies * * * that state limitations periods are irrelevant," since, "by way of analogy, under the Federal Rules of Civil Procedure even a time-barred action may be 'commenced' by the filing of a complaint." *Oscar Mayer*, 441 U.S. at 759 (citing Fed. R. Civ. P. 3). The second feature is the last sentence of the provision, which states that, if any requirement for the commencement of proceedings is imposed by a State "other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based," the proceeding shall be deemed to have been commenced at the time the statement is mailed to the appropriate state authority. 29 U.S.C. 633(b). The Court reasoned that a limitation period is a requirement "other than a requirement of the filing of a written and signed statement," and that a state proceeding must therefore be "deemed commenced * * * as soon as the complaint is filed," without regard to whether the filing was timely. 441 U.S. at 760.

B. The Ninth Circuit's Decision Is Inconsistent With The History Of The PLRA

Four years before Congress enacted the PLRA, this Court decided *McCarthy* v. *Madigan*, 503 U.S. 140 (1992), which addressed the question whether a federal prisoner must exhaust administrative remedies before filing suit under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court answered that question no. The basis for the decision was that Congress had not required exhaustion—the CRIPA imposed only a "limited" exhaustion requirement, *McCarthy*, 503 U.S. at 150, and did not reach *Bivens* suits at all—and that it would be inappropriate for the Court to impose such a requirement. *Id.* at 149-156. The Court stressed, however, that Congress was free to do so. See *id.* at 156.

While the Court did not adopt an exhaustion requirement in *McCarthy*, it assumed that, if there were a general exhaustion requirement, it would not be satisfied if an inmate's administrative claim was denied as untimely. Indeed, that was one of the grounds for the Court's decision. The Court explained that the CRIPA required exhaustion only if it was "in the interests of justice," and that the CRIPA therefore gave a court discretion to allow an inmate's suit to proceed even if he "fail[ed] to meet filing deadlines under an administrative scheme." 503 U.S. at 150 (quoting CRIPA § 7(a)(1), 94 Stat. 352). A more typical exhaustion rule would not allow for such discretion, and the Court found it "difficult to see why a stricter rule of exhaustion than Congress itself ha[d] required in the state prison context should apply in the federal prison context." *Id.* at 150-151. Then, in evaluating "the individual and institutional interests" implicated by a stricter rule of exhaustion (and determining that the former outweighed the latter), the Court observed that prison filing deadlines "create a high risk of forfeiture of a claim for failure to comply," and

that the deadlines "require a good deal of an inmate at the peril of forfeiting his claim." *Id.* at 152-153.

McCarthy thus assumed that a general exhaustion requirement—as opposed to the CRIPA's "limited" requirement, 503 U.S. at 150—would incorporate a procedural-default rule and thus bar a federal suit if the administrative claim was denied as untimely. It is presumed that Congress is familiar with this Court's decisions when it legislates, see, *e.g.*, *Conroy* v. *Aniskoff*, 507 U.S. 511, 516 (1993), and that Congress "expects its statutes to be read in conformity with th[e] Court's precedents," *Porter*, 534 U.S. at 528 (quoting *United States* v. *Wells*, 519 U.S. 482, 495 (1997)). That canon has particular force here, because the legislative history of the PLRA confirms that Congress was familiar with *McCarthy*—and, indeed, that it was responding to that decision when it enacted the law. See 141 Cong. Rec. 35,623 (1995) (statement of Rep. LoBiondo). It therefore follows that, when it passed the PLRA, which included an "invigorated" exhaustion requirement, *Porter*, 534 U.S. at 529, applicable to both federal and state prisoners, see *id.* at 524, Congress intended to enact the exhaustion requirement that this Court had identified, but declined to adopt as a matter of judicial discretion, in *McCarthy* just four years earlier.

The Court drew a similar conclusion based on *McCarthy* in *Booth*, *supra*, which holds that exhaustion is required under the PLRA even if the inmate seeks only money damages and the administrative procedure does not provide such a remedy. The Court noted that the CRIPA had required exhaustion only of "effective" administrative remedies and that *McCarthy* had indicated that "only a procedure able to provide money damages would be 'effective'" when money damages was all that a prisoner sought. 532 U.S. at 740 (quoting CRIPA § 7(a)(1), 94 Stat. 352). The Court then reasoned that the PLRA required a different result than *McCarthy* because Congress "removed the very term"—"effective"—that the Court had "previously emphasized." *Ibid.* So too here. The

CRIPA required exhaustion only if it was "in the interests of justice," CRIPA § 7(a)(1), 94 Stat. 352, and *McCarthy* indicated that that language gave district courts discretion to hear an inmate's suit even if he "fail[ed] to meet filing deadlines under an administrative scheme," 503 U.S. at 150. The PLRA then removed the very term—"interests of justice"—that the Court had previously emphasized. The "statutory history," *Booth*, 532 U.S. at 739, thus bolsters the conclusion that the PLRA requires *proper* exhaustion, including compliance with applicable filing deadlines.

C. The Ninth Circuit's Decision Is Inconsistent With The Purposes Of The PLRA

1. a. It is "[b]eyond doubt" that "Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits." *Porter*, 534 U.S. at 524. This Court has recognized that, in requiring prisoners to "afford[] corrections officials time and opportunity to address complaints internally before * * * the initiation of a federal case," *id.* at 525, Congress had three principal objectives in mind. First, exhaustion might enable a prisoner to obtain relief in the administrative process, "thereby obviating the need for litigation." *Ibid.* Even relief that is different from (or less than) that requested will "satisfy at least some inmates." *Booth*, 532 U.S. at 737. Second, "internal review might 'filter out some frivolous claims.'" *Porter*, 534 U.S. at 525 (quoting *Booth*, 532 U.S. at 737). When an administrative decisionmaker rejects a claim and explains the reasons for doing so, the inmate may be persuaded that it is not worth pursuing the claim in court, particularly since the PLRA's "three strikes" provision precludes the filing of an *in forma pauperis* suit after the inmate has had at least three prior cases dismissed on the ground that they were "frivolous" or "malicious," or "fail[ed] to state a claim upon which relief may be granted." 28 U.S.C. 1915(g). Third, "for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies

the contours of the controversy," *Porter*, 534 U.S. at 525, and thereby "foster[s] better-prepared litigation," *Booth*, 532 U.S. at 737. In general, complaints filed by inmates are notoriously difficult to decipher, and the development of an administrative record can help inmates refine them, or at least illuminate the nature of the claims. The administrative process may also put the parties in a better position to move for summary judgment, and reduce the need for burdensome and costly discovery.

If the untimely filing of an administrative claim is not a bar to suit, as the Ninth Circuit held, the incentive of prisoners to comply with limitation periods will be substantially reduced, and the number of untimely claims will inevitably increase. When a claim is not timely filed, the administrative decisionmaker will almost always resolve it without reaching the merits, particularly when, as in this case, the claim is filed long after the deadline has passed. See *Pozo*, 286 F.3d at 1025. And to the extent that decisionmakers resolve administrative claims without reaching the merits, the principal purposes of the PLRA's exhaustion requirement will be defeated. The need for litigation will not be obviated (since the inmate will not be granted relief); frivolous claims will not be filtered out (since there will be no explanation of why the claim lacks merit); and an administrative record will not be created (since there is no factual development when a claim is rejected on procedural grounds). Because those congressional objectives will be furthered only if prison administrators routinely decide inmate grievances on the merits, Congress "could not have intended a definition of exhaustion that routinely permits claims to reach the federal courts without the benefit of any prior consideration on the merits." *Thomas*, 337 F.3d at 750 n.8 (Rosen, J., dissenting in part).

In resolving the interpretive question presented in *Porter*, this Court relied, in part, on "the PLRA's dominant concern to promote administrative redress, filter out groundless claims, and foster better prepared litigation of claims aired in

court." 534 U.S. at 528. As a number of courts of appeals have recognized, the same "dominant concern" requires a conclusion that the term "exhaustion" in Section 1997e(a) means *proper* exhaustion.[9]

b. In addition to the three principal objectives identified by this Court, other purposes served by the PLRA's exhaustion requirement would be undermined if a prisoner could exhaust remedies by filing untimely administrative claims. First, the exhaustion requirement reflects a recognition that prison officials are in the best position to investigate and evaluate complaints in the first instance and decide what corrective action, if any, should be taken. If a substantial proportion of prisoner claims are allowed to proceed to federal court without having been previously addressed on the merits, the courts, in effect, will be "act[ing] as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints," a task for which they are "ill suited." *Procunier* v. *Martinez*, 416 U.S. 396, 405 n.9 (1974), overruled in part on other grounds by *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989). Second, the exhaustion requirement helps to ensure that inmates bring dangerous conditions and abusive practices to the attention of prison authorities as soon as possible, so they can take appropriate corrective action. Under the Ninth Circuit's decision, prisoners have a greatly diminished incentive to report such matters immediately, and thus prison officials may not be promptly apprised of dangerous

---

[9] See *Johnson*, 418 F.3d at 1159 ("none of the aims of § 1997e(a) has been achieved here because prison officials did not review the merits of Johnson's complaint"); *Spruill*, 372 F.3d at 230 ("[a]ll three goals [of Section 1997e(a)] are obviously served by a procedural default rule"); *Ross*, 365 F.3d at 1186 ("[a]llowing prisoners to proceed to federal court simply because they have filed a time-barred grievance would frustrate the PLRA's intent"); *Pozo*, 286 F.3d at 1023-1024 ("allow[ing] a prisoner to 'exhaust' state remedies by spurning them * * * would defeat the statutory objective"). See also *Thomas*, 337 F.3d at 742 (Rosen, J., dissenting in part) (because inmate's grievance was rejected as untimely, his complaint was not reviewed on the merits and "none of the aims of § 1997e(a) has been achieved").

conditions and abusive practices. Third, a prison grievance process has the potential to be a far less adversarial and far more cooperative means of resolving inmate complaints than litigation in federal court. When inmates deprive themselves of the opportunity for administrative relief by filing untimely claims, and then name their guards as defendants in federal lawsuits, the tensions that already exist in prison may be exacerbated. Finally, the exhaustion requirement helps "avoid the possibility that frequent * * * flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *Johnson* v. *Meadows*, 418 F.3d 1152, 1156 (11th Cir. 2005) (quoting *Alexander* v. *Hawk*, 159 F.3d 1321, 1327 (11th Cir. 1998)), petition for cert. pending, No. 05-6336 (filed Sept. 8, 2005). As Judge Becker has observed, one of the "subtler benefits" of requiring *proper* exhaustion is that it "enhances the integrity of prison administration" by "ensur[ing] prisoner compliance with the specific requirements of the grievance system." *Spruill*, 372 F.3d at 230.[10]

2. a. Respondent contends that "a prisoner has no strategic incentive to 'disregard[]' the prison grievance process, because the result of that process * * * receives no deference in and has no effect on the subsequent § 1983 suit." Br. in Opp. 15 (quoting Pet. 8). That contention is wrong and ultimately misses the point. An inmate seeking to tie up prison officials in litigation may well have incentives to bypass the administrative process and its salutary benefits of focusing the lawsuit. In addition, a failure to file a timely administrative claim may put a prisoner in federal court more quickly than if he properly exhausts the appellate process. In any event, the major concern is less that the Ninth Circuit's deci-

[10] When an administrative claim has been adjudicated on the merits, the statutory purposes have been served, and the PLRA's exhaustion requirement has been satisfied. That is true even if the claim was untimely and could have been rejected on that ground, but prison officials nevertheless exercised their discretion to consider it. See *Ross*, 365 F.3d at 1186; *Pozo*, 286 F.3d at 1025.

sion creates an incentive to file untimely claims than that it undermines the incentive to file *timely* claims. The rule applied by the majority of circuits, in contrast, "creates an overwhelming incentive" to do so. *Spruill*, 372 F.3d at 230.

The Ninth Circuit believed that, under its approach, prisoners *will* have a strong incentive to file timely administrative claims, because such claims provide "an additional attempt to win a favorable ruling" and "the fastest route to a remedy." Pet. App. 16-17. That assertion is at odds with the record before Congress when it enacted the PLRA, which established that "[t]he vast majority of [prisoner] suits are completely without merit." 141 Cong. Rec. at 26,553 (statement of Sen. Hatch). Congress passed the PLRA because, in the words of one of its sponsors, suing had become a "recreational activity for [many] long-term residents of our prisons," who recognize that "a courtroom is * * * a more hospitable place to spend an afternoon than a prison cell" and therefore "churn[ed] out" suits "in response to almost any perceived slight or inconvenience" and "with no regard to * * * their legal merit." *Id.* at 26,553-26,554 (statement of Sen. Kyl). Such prisoners "would have nothing to lose in flouting prison procedures, because they would have no legitimate expectation of obtaining any remedy through the prison's grievance process." *Thomas*, 337 F.3d at 752 (Rosen, J., dissenting in part). For them, "it matters only that they reach the finish line of th[e] process and secure their ticket to federal court." *Ibid.*

b. The Ninth Circuit also expressed the view that, even if its decision had the effect of increasing the number of untimely administrative filings, it would "in no way obstruct the goal of allowing prison officials first crack at resolving prisoners' grievances," because the prison "decide[s] whether to exercise its discretion and accept or refuse the opportunity to hear the case on the merits regardless whether the grievance is timely filed." Pet. App. 17. In this case, the court of appeals observed, the appeals coordinator "*could* have consid-

ered [respondent's] appeal; she was authorized to do so by the grievance regulations, but elected not to." *Ibid.* The Ninth Circuit thus endorsed the Sixth Circuit's view that the purposes of the PLRA's exhaustion requirement would be defeated only if prison administrators were not given "*any* opportunity to review the claim." *Thomas*, 337 F.3d at 727. That view is mistaken.

The notion that prison administrators need only be given "some opportunity" to decide a claim on the merits cannot be reconciled with the fact, acknowledged by the Ninth Circuit, that an inmate does not exhaust administrative remedies unless he "submit[s] his * * * grievance to the prison and appeal[s] all denials of his claims completely through the prisons' administrative process." Pet. App. 17. A prisoner who files a timely claim at one or more but not all administrative levels has given the prison *some* opportunity to address his claim on the merits, but he has nevertheless failed to comply with the PLRA's exhaustion requirement. Under the Ninth Circuit's decision, a prisoner who makes a *timely* filing at three levels but does not file any claim at the fourth has *not* satisfied the exhaustion requirement, but a prisoner who makes an *untimely* filing at all four levels *has*. The Ninth Circuit made no effort to explain why Congress would have intended such an anomalous result.

Congress did not intend such a result. There has been no exhaustion in either circumstance, because it is never sufficient that prison administrators be given *some* opportunity to decide a claim on the merits. The exhaustion doctrine requires that the decisionmaker be given a "full and fair opportunity," *Boerckel*, 526 U.S. at 845, and thus a "meaningful opportunity," *Vasquez* v. *Hillery*, 474 U.S. 254, 257 (1986), to decide the claim, and prison officials do not have a full, fair, and meaningful opportunity to decide claims denied as untimely. Indeed, under the Ninth Circuit's decision, an inmate satisfies the PLRA's exhaustion requirement as long as he files his administrative claims, which are ordinarily due within

days or weeks of the challenged action or decision, see Br. of Amici New York et al. in Support of Pet. 3 n.2, before the expiration of the applicable statute of limitations for a *Bivens* or 1983 suit, which is ordinarily two years, see, *e.g.*, *Johnson*, 418 F.3d at 1154 (Georgia); Pet. App. 20 n.4 (California); *Thomas*, 337 F.3d at 754 & n.14 (Rosen, J., dissenting in part) (Ohio), but could be as long as six, see *Wudtke* v. *Davel*, 128 F.3d 1057, 1061 (7th Cir. 1997) (Wisconsin).

At bottom, the Ninth Circuit's decision minimizes the harm to prison officials caused by late or otherwise defective filings, because they can always waive their deadlines or adopt longer ones. That view ignores the fact that there are "good reasons for establishing deadlines for the filing of grievances." *Thomas*, 337 F.3d at 753 (Rosen, J., dissenting in part). They include (1) "the inherent benefit of prompt investigation, while memories are still fresh and all involved inmates and prison employees remain at the facility"; (2) "the desire to bring the entire matter, including all available internal appeals, to a conclusion within a reasonable time period"; and (3) "the greater likelihood that a prisoner might be satisfied by swift action against any transgressors." *Ibid.* Those benefits "accrue to prisoners and prison officials alike." *Ibid.* See also *McCarthy*, 503 U.S. at 157 (Rehnquist, C.J., concurring in the judgment) ("short filing deadlines will almost always promote quick decisionmaking by an agency").

Nor is there any reason to presume that prisons do not ordinarily enforce their deadlines, even when, as here, prison officials have discretion to consider untimely claims. As with other adjudicators that are presented with an untimely claim, see, *e.g.*, *Schacht* v. *United States*, 398 U.S. 58, 64 (1970) (this Court may consider untimely certiorari petition in criminal case "when the ends of justice so require"), it should be presumed that prison administrators will consider an inmate's untimely administrative claim only if there is a satisfactory

excuse for the failure to meet the deadline.[11] And a decision-maker cannot be said to have had a full, fair, and meaningful opportunity to consider claims that, under the applicable legal regime, are considered only in unusual circumstances.

The Ninth Circuit did not deny that prisons ordinarily enforce their filing deadlines. Instead, it effectively sought to "shift[] * * * from inmates to prison officials," *Thomas*, 337 F.3d at 742 (Rosen, J., dissenting in part), the burden of satisfying the PLRA's objective that inmate grievances be adjudicated on the merits in prison before arriving in federal court. There is no basis to believe, however, that Congress wished to put prison officials to the choice of vindicating the purposes of the PLRA's exhaustion requirement by ignoring their own filing deadlines, on the one hand, or enforcing the deadlines and thereby undermining the exhaustion requirement's purposes, on the other. Indeed, the benefits of exhaustion are largely the benefits of *timely* exhaustion, which enables development of the factual record while memories are fresh.

The "some opportunity" theory rests on the mistaken premise that the PLRA's exhaustion requirement is merely "a benefit accorded to state prisons, an opportunity to satisfy those inmate grievances the state wishes to handle internally." *Thomas*, 337 F.3d at 726. In fact, the exhaustion requirement benefits not only prisons but also (1) the federal-court system, which had been inundated with frivolous prisoner suits; (2) the parties in other federal cases that litigate in good faith and suffer when scarce judicial resources are

[11] Some States' regulations explicitly provide that an untimely claim will be considered only on a showing of "good cause," see, *e.g.*, Md. Regs. Code tit. 12, § 12.07.01.06(F) (2004); Ohio Admin. Code § 5120:9-31(J)(2) and (3) (2002); Wis. Admin. Code DOC §§ 310.09(6), 310.13(2) (2005), and the BOP's regulations allow an extension of the deadline if the inmate demonstrates "a valid reason," 28 C.F.R. 542.14(b), 542.15(a). California's regulations provide that an untimely appeal "may be rejected" if the inmate "had the opportunity to file within the prescribed time constraints," Cal. Code Regs. tit. 15, § 3084.3(c)(6) (2002), but they do not specify the showing necessary for such an appeal to be accepted.

expended on frivolous litigation; and (3) the taxpayers who pay for the court system and the defense of prisoner suits. As one of the PLRA's sponsors observed, "[f]rivolous lawsuits * * * by prisoners tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens." 141 Cong. Rec. at 26,548 (statement of Sen. Dole). As another sponsor observed, it is precisely "the burden that [prisoners'] cases place on the Federal court system" that makes "[a]n exhaustion requirement * * * appropriate." *Id.* at 14,572-14,573 (statement of Sen. Kyl). By allowing inmates to sue in federal court when prisons enforce their filing deadlines, the Ninth Circuit's decision ignores these other important interests that the PLRA's exhaustion requirement was intended to serve.

D. The Ninth Circuit's Decision Cannot Be Justified By The Policy Considerations On Which It Relied

The Ninth Circuit also relied on "policy concerns" that, in its view, "cut against" interpreting the PLRA to require the timely presentation of administrative claims. Br. in Opp. 16 (emphasis omitted). Those policy considerations cannot overcome the text, history, and purposes of the exhaustion provision, and in any event are misguided.

The Ninth Circuit believed that petitioners' interpretation would penalize "the less sophisticated and less informed," who are unrepresented and thus "unable to satisfy complex and demanding procedural requirements." Pet. App. 19. In support of that view, the court cited (*ibid.*) the portion of *McCarthy* in which this Court expressed a similar view. See 503 U.S. at 153. But the Court expressed that view in the context of explaining why *it* would not fashion an exhaustion requirement for *Bivens* suits by federal prisoners. See *id.* at 152-156. As was made clear in that very section of the opinion, the Court assumed that, if either Congress or this Court *were* to create an exhaustion requirement for prisoner suits, prisoners *would* be obligated to comply with administrative

filing deadlines. See *id.* at 152-153. Insofar as the language on which the Ninth Circuit relied has any significance, therefore, it is that Congress adopted an exhaustion requirement *despite* the contrary policy consideration identified by this Court in *McCarthy* (and reiterated by the Ninth Circuit here). Indeed, this Court acknowledged in *Booth* that Congress "may well have thought" that *McCarthy* was "shortsighted." 532 U.S. at 737.

In any event, this Court has recognized "the inseparability of the exhaustion rule and the procedural-default doctrine" in the habeas corpus context, *Carpenter*, 529 U.S. at 452, such that failure to comply with a filing deadline in state post-conviction proceedings can bar a habeas corpus petition in federal court. That is true even though prisoners in state post-conviction proceedings, like prisoners in administrative proceedings, are "almost inevitably proceeding without the guidance of counsel," Br. in Opp. 16, since there is no constitutional right to counsel at that stage of the case, see *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987).

Like the Sixth Circuit, which believed that interpreting the PLRA to require the timely filing of administrative claims "would likely lead to shorter and shorter limitations periods," *Thomas*, 337 F.3d at 729 n.3, the Ninth Circuit was also concerned that such an interpretation would give prison administrators "an incentive to fashion grievance procedures which prevent or even defeat prisoners' meritorious claims," Pet. App. 21. That concern has not been shown to be justified. Most jurisdictions require the filing of administrative claims within 14 to 30 days of the action being challenged. See Br. of Amici New York et al. in Support of Pet. 3 n.2.[12] And neither the Ninth Circuit nor respondent (who makes the same

[12] Under the BOP's regulations, the filing deadlines are 20 calendar days for submission of an "Administrative Remedy Request" to the Warden; 20 calendar days for appeal of an adverse decision by the Warden to the Regional Director; and 30 calendar days for appeal of an adverse decision by the Regional Director to the General Counsel. 28 C.F.R. 542.14(a), 542.15(a).

argument, Br. in Opp. 16-17) has cited any instance in which a filing deadline was made even shorter, or in which some other "onerous" procedural requirement was imposed (*id.* at 16), in light of the court of appeals decisions that reject the Ninth Circuit's interpretation of the PLRA. See also *Thomas*, 337 F.3d at 753 n.12 (Rosen, J., dissenting in part) ("To my knowledge, this has not occurred.").

In any event, "[t]he policy argument[] * * * should be addressed to Congress rather than to this Court." *Blum* v. *Stenson*, 465 U.S. 886, 895-896 (1984). As explained above, the text, history, and purposes of the PLRA all point to the conclusion that Congress intended its exhaustion provision to require the *proper* exhaustion of administrative claims. There was no basis for the Ninth Circuit to disregard that intent on the basis of its own policy views.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
GREGORY G. GARRE
Deputy Solicitor General
DAN HIMMELFARB
Assistant to the Solicitor General
BARBARA L. HERWIG
ISAAC J. LIDSKY
Attorneys

DECEMBER 2005

(8)

No. 05-416

FILED
FEB 2 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JEANNE S. WOODFORD, ET AL.,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

MICHAEL S. GRECO*
President
American Bar Association
321 N. Clark Street
Chicago, IL 60610
(312) 988-5000

**Counsel of Record*

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Engrafting A Procedural Default Rule Onto The PLRA Would Improperly Interfere With A Prisoner's Right To Pursue Valid Constitutional Claims 5

II. A Procedural Default Rule Goes Beyond The Text and Purpose Of The PLRA's Exhaustion Requirement 8

III. The Court Should Not Import A Procedural Default Rule From Habeas Corpus Jurisprudence 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Booth v. Churner,
532 U.S. 731 (2001) 18

Bounds v. Smith,
430 U.S. 817 (1977) 3, 6

Burnett v. Grattan,
468 U.S. 42 (1984) 12

Christina A. v. Bloomberg,
315 F.3d 990 (8th Cir. 2003) 14

City of Rancho Palos Verdes, Calif. v. Abrams,
125 S. Ct. 1453 (2005) 10

Cleavinger v. Saxner,
474 U.S. 193 (1985) 17

Coleman v. Thompson,
501 U.S. 722 (1991) 5, 16

Crawford-El v. Britton,
523 U.S. 574 (1998) 13

Edwards v. Balisok,
520 U.S. 641 (1997) 16

EEOC v. Commercial Office Products Co.,
486 U.S. 107 (1988) 4, 12

Felder v. Casey,
487 U.S. 131 (1988) 8

I.N.S. v. St. Cyr,
533 U.S. 289 (2001) 2

Lewis v. Gagne,
281 F. Supp. 2d 429 (N.D.N.Y. 2003) 14

Love v. Pullman Co.,
404 U.S. 522 (1972) 13

McCarthy v. Madigan,
503 U.S. 140 (1992) 6, 14

Monroe v. Pape,
365 U.S. 167 (1961) 9

Muhammad v. Close,
540 U.S. 749 (2004) 6, 16

Nelson v. Campbell,
541 U.S. 637 (2004) 16

Occidental Life Insurance Co. v. EEOC,
432 U.S. 355 (1977) 12

Oscar Mayer & Co. v. Evans,
441 U.S. 750 (1979) ..... passim

Porter v. Nussle,
534 U.S. 516 (2002) 5, 9, 19

Rompilla v. Beard,
125 S. Ct. 2456 (2005) 2

Rose v. Lundy,
455 U.S. 509 (1982) 5, 16, 17

Spruill v. Gillis,
372 F.3d 218 (3d Cir. 2004) 15

Strickland v. Washington,
466 U.S. 668 (1984) 2

Strong v. David,
297 F.3d 646 (7th Cir. 2002) 8

Town of Castle Rock, Colo. v. Gonzales,
125 S. Ct. 2796 (2005) 2

United States v. Wells,
519 U.S. 482 (1997) 7

Wilkinson v. Dotson,
125 S. Ct. 1242 (2005) 15, 17

Williams v. Taylor,
529 U.S. 362 (2000) 2

Statutes

42 U.S.C. § 1983 6

42 U.S.C. § 1997 6

42 U.S.C. § 1997e 7, 9

Cal. Code Civ. Proc. § 335.1 10

Other Authorities

141 Cong. Rec. S14611 (1995) 7, 15

4 ABA Standards for Criminal Justice
23-1.1 (2d ed. 1983) 2

4 ABA Standards for Criminal Justice
23-2.1 (2d ed. 1983) 3

Florida Corrections Commission 1999 Report, App. 4.3,
www.fcc.state.fl.us/fcc/reports/final99/ap4-3.html. 8

Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts, and Correctional Officials Can Learn from It*,
86 CORNELL L. REV. 483, 518 (2001) 17

Report of the American Bar Association
120B (1995 Annual Meeting) 3

U.S. Department of Education,
Literacy Behind Prison Walls (1994),
http://nces.ed.gov/pubs94/94102.pdf
(last visited December 26, 2005) 14

Regulations

Cal. Code Regs. tit. 15, § 3084.6(c) 7

INTEREST OF *AMICUS*[1]

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession, dedicated to the promotion of a fair system of justice. The ABA's more than 407,000 members include prosecutors, public defenders, private attorneys, state and federal trial and appellate judges,[2] legislators, law professors, law enforcement and corrections personnel, law students, and nonlawyer "associates" in allied fields. Since its inception, the ABA has actively promoted improving the administration of justice and increasing the availability and quality of legal counseling to those who need it.

The ABA respectfully submits this brief *amicus curiae* because of its longstanding commitment to ensure that prisoners are afforded meaningful access to the courts so that their constitutional rights are protected. More specifically, the question presented by this case implicates matters addressed by the ABA Standards for Criminal Justice, which have been widely relied upon, including by this Court, as a guide to criminal justice administration. *See, e.g., Town of*

---

1 The parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* represents that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

2 Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796, 2805-06 (2005); *Rompilla v. Beard*, 125 S. Ct. 2456, 2465-66 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522-24 (2003); *I.N.S. v. St. Cyr*, 533 U.S. 289, 322 n.48 (2001); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984). The Standards have been developed, refined, and approved over more than thirty years by task forces of the ABA comprised of prosecutors, judges, defense lawyers, academics, and others, as well as by the wider and diverse membership of the ABA.

The ABA has a long history of supporting the general principle that, subject to several specific exceptions, prisoners have certain basic constitutional rights. 4 ABA Standards for Criminal Justice 23-1.1 (2d ed. 1983). The ABA reaffirmed its commitment to this core principle in 1995 when it adopted a resolution that provides in part as follows:

> [A]s a general principle, prisoners retain the constitutional rights of free citizens. Exceptions to the foregoing are when restrictions are necessary to assure orderly confinement and interaction, when restrictions are necessary to provide reasonable protection for the rights and physical safety of all members of the prison system and the general public, and when Association policy or standards specifically provide to the contrary.

Report of the American Bar Association 120B (1995 Annual Meeting).

Several of the ABA Standards speak directly to the issue in this case and support the Respondent's position. Most directly, Standard 23-2.1, entitled "Access to the judicial process," states:

> Prisoners should have free and *meaningful access to the judicial process*; governmental authorities should assure such access. *Regulations or actions should not* unduly delay or *adversely affect the outcome of a prisoner's claim for relief or discourage prisoners from seeking judicial consideration for their grievances.* Interests of institutional security and scheduling may justify regulations that affect the manner in which access is provided.

4 ABA Standards for Criminal Justice 23-2.1 (2d ed. 1983) (emphasis added).

SUMMARY OF ARGUMENT

1. "[P]risoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). The Prison Litigation Reform Act of 1995, Pub. L. 104-134, 110 Stat. 1321 (1996) ("PLRA"), provides that a prisoner who brings a claim under 42 U.S.C. § 1983 must first exhaust the administrative remedies available in the prison system. Some courts have broadened this statutory requirement by demanding that prisoners also comply to the letter with all procedural requirements crafted by prison officials, including time limits, or be "procedurally defaulted" and barred from bringing their federal lawsuits. This case presents the question whether this judicially-created "procedural default rule" should be upheld, notwithstanding the fact that it is not mentioned in the text of the PLRA, inhibits a prisoner's constitutional right of access to the courts, and does not further the congressional policies underlying the PLRA.

2. Because prison grievance procedures typically provide short deadlines to file a grievance, sometimes as little as a few days, the rule proposed by Petitioners would create

enormous practical barriers to the ability of prisoners—including juveniles and illiterate prisoners—to pursue meritorious civil rights claims. Nothing in the text or legislative history of the PLRA suggests that Congress intended such a drastic interference with a prisoner's constitutional right of access to the courts.

The creation of a procedural default rule unsupported by statutory language is inconsistent with this Court's decisions with respect to other statutory schemes that include administrative exhaustion requirements. Most notably, in cases brought under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, this Court has held that a petitioner's failure to meet a state-imposed statute of limitations for filing an administrative grievance does not constitute failure to exhaust administrative remedies and does not bar the petitioner from pursuing the claim in federal court. *See EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 124 (1988); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 762-63 (1979).

3. Circuits that have imposed a procedural default rule in prisoner civil rights litigation have improperly imported the rule from *Coleman v. Thompson*, 501 U.S. 722 (1991), with respect to habeas corpus petitions. This Court explained that a procedural default rule furthers the purposes underlying the requirement in the habeas context that state judicial remedies be exhausted: "'to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings.'" *Id.* at 731-32 (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)).

The PLRA's administrative exhaustion requirement, however, was neither designed nor intended to preserve the power of state courts, which have authority and expertise to render decisions regarding the scope of constitutional and other legal rights. Congress's purpose in enacting the

PLRA's administration exhaustion requirement was simply to reduce the quantity and improve the quality of prisoner suits by "afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). This purpose is met so long as a prisoner pursues a grievance through the grievance process, though perhaps not necessarily in perfect compliance with the short timelines often set by corrections officials. In other words, so long as the grievance has been submitted to corrections officials, they will have been afforded an opportunity contemplated by Congress to resolve the grievance internally, if they so desire.

ARGUMENT

I. Engrafting A Procedural Default Rule Onto The PLRA Would Improperly Interfere With a Prisoner's Right To Pursue Valid Constitutional Claims

1. "[P]risoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). One of the principal means for a prisoner to pursue this constitutional right is to file a complaint under the Civil Rights Act of 1871 (as amended, 42 U.S.C. § 1983). *See Muhammad v. Close*, 540 U.S. 749, 750 (2004).

Before the passage of the PLRA, a prisoner's right to initiate a civil rights lawsuit in federal court was subject to the provisions of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 ("CRIPA"). In interpreting the provisions of the CRIPA against the backdrop of a prisoner's constitutional right of access to the courts, this Court in 1992 explained: "[t]he first of the principles that necessarily frame our analysis of prisoner's constitutional claims is that federal courts must take cognizance of the valid constitutional claims

of prison inmates." *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992).

2. In 1996, Congress passed the PLRA, which included a revised administrative exhaustion provision stating that no action shall be brought by a prisoner under 42 U.S.C. § 1983 or other federal law with respect to prison conditions "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA did not change the principle that federal courts must take cognizance of the valid constitutional claims of prison inmates. *See United States v. Wells*, 519 U.S. 482, 495 (1997) (stating that the Court "presume[s] that Congress expects its statutes to be read in conformity with th[e] Court's precedents"). Rather, as the legislative history reveals, the purpose of the PLRA was to "prevent[] inmates from abusing the judicial system," 141 Cong. Rec. S14611 (1995) (statement of Sen. Hatch), while still "allow[ing] meritorious claims to be filed." 141 Cong. Rec. S14611 (1995) (statement of Sen. Thurmond).

3. Importing a procedural default rule into the PLRA's exhaustion requirement imposes barriers not intended by Congress to prisoners' exercise of the constitutional right of access to courts, particularly given the short time frames allowed for the filing of an administrative grievance. The California Department of Corrections ("CDOC"), which has custody of the Respondent, Viet Mike Ngo, limits this period to fifteen days following "the event or decision being appealed." *See* Cal. Code Regs. tit. 15, § 3084.6(c). In some states, this deadline is as short as 48 hours. *See* Florida Corrections Commission 1999 Report, Appendix 4.3, www.fcc.state.fl.us/fcc/reports/final99/ap4-3.html (last visited December 26, 2005).

As this Court has recognized, many victims of civil rights violations will not recognize their right to legal redress

within even 120 days after a violation. Consequently, in *Felder v. Casey*, 487 U.S. 131 (1988), the Court held that a state's notice-of-claim statute, which required that state and local governmental officials be notified of a claim within 120 days of the event giving rise to it, was unenforceable in a § 1983 suit. Prisoners are even less equipped to recognize, in far shorter periods of time, that their civil rights have been violated, that they have a legal right to redress, and that they must file a grievance as a precondition to obtaining such redress.

While the supposed procedural default at issue in this case is Ngo's alleged failure to file a grievance within fifteen working days of "the event or decision being appealed," the procedures that prisoners are required to navigate are not restricted to compliance with short filing deadlines, but they may encompass a variety of pleading and other formal requirements. *See Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002) (holding that exhaustion has not occurred unless the prisoner files a grievance in the place, at the time, and with the level of detail required by the prison administrative rules). Importing a procedural default rule into the PLRA's exhaustion requirement would contravene the very purpose of § 1983 – to enable federal courts to redress civil rights violations by state actors. *See Monroe v. Pape*, 365 U.S. 167, 180 (1961). A procedural default rule would enable prison, jail, and other correctional officials, typically the defendants in § 1983 suits brought by inmates, to craft their grievance rules in ways that make it difficult or impossible for prisoners to obtain access to the courts and vindicate their constitutional and other civil rights.

II. A Procedural Default Rule Goes Beyond The Text And Purpose Of The PLRA's Exhaustion Requirement

1. The procedural default rule that Petitioners ask this Court to impose would require dismissal of a prisoner's civil rights claim where the prisoner sought to invoke the prison grievance system, but the grievance was rejected as "procedurally defective." This rule goes beyond the express language of 42 U.S.C. § 1997e(a). The PLRA mandates exhaustion of available administrative remedies, but says nothing about procedural default. The statute reads: "No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). A procedural default rule goes far beyond the plain language of the PLRA.

2. Judicial engrafting of a procedural default rule onto the exhaustion provision would also usurp Congress's authority in amending the exhaustion provision found in the Civil Rights of Institutionalized Persons Act. As this Court explained in *Porter v. Nussle*, 534 U.S. 516 (2002), the purpose of the PLRA's administrative exhaustion requirement was to reduce the quantity and improve the quality of prisoner suits by "afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Id.* at 524-25. As long as a prisoner pursues a grievance through all levels of the grievance process, thereby giving prison officials a chance to address the claim and "exhausting" whatever administrative remedies may exist, the statutory exhaustion requirement is satisfied even though the prisoner does not meet the time constraints imposed by prison officials. Prison officials thus are afforded the opportunity to resolve a dispute internally, if they so desire, before a court adjudicates the

legal merits of the claim. Encouraging prison administrators instead to rely on procedural "defects" to decline to address prison grievances would be antithetical to the primary purpose underlying the PLRA's exhaustion requirement—to afford corrections officials time and opportunity to address complaints internally.

3. The judicial implanting of a procedural default rule in the PLRA's exhaustion requirement, as a practical matter, operates to shorten the statute of limitations significantly for a prisoner plaintiff pursuing a § 1983 claim. "The statute of limitations for a § 1983 claim is generally the applicable state-law period for personal-injury torts." *City of Rancho Palos Verdes, Calif. v. Abrams*, 125 S. Ct. 1453, 1540 n.5 (2005). For example, Ngo's § 1983 claim arising in California would have a two-year statute of limitations. *See* Cal. Code Civ. Proc. § 335.1 (providing a two-year statute of limitations for personal-injury torts). But if a procedural default rule were imposed by this Court, a prisoner's claim would be barred if he or she failed to meet the fifteen-day requirement imposed by CDOC.

Neither the text of the PLRA nor its legislative history reflects any intent by Congress to alter the statute of limitations otherwise applicable to § 1983 claims. Absent express statutory authority, adopting a rule that would subordinate the statute of limitations for a § 1983 claim to the varying time limitations adopted by grievance processes in a wide gamut of correctional facilities, including jails, juvenile detention centers, and juvenile training schools, is inconsistent with prior decisions of this Court.

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), an involuntarily retired employee brought suit against his former employer under the Age Discrimination in Employment Act ("ADEA"). *Id.* at 754. After recognizing that the ADEA required claimants to utilize state

administrative procedures prior to filing a federal claim, the plaintiff sought to file an administrative claim with the Iowa State Civil Rights Commission. The defendant employer sought dismissal of the federal lawsuit on the ground that Iowa's 120-day statute of limitations already had run. *Id.* at 758-59. This Court rejected the employer's argument. *Id.* at 761-62. The Court noted that the ADEA's exhaustion requirement does not expressly alter the statute of limitations for claims brought under the ADEA. *Id.* at 759 ("In particular, there is no requirement that, in order to commence state proceedings and thereby preserve federal rights, the grievant must file with the State within whatever time limits are specified by state law."). Absent statutory authority, the Court refused to impose a rule that would alter the statute of limitations, explaining:

> Congress could not have intended to consign federal lawsuits to the "vagaries of diverse state limitations statutes," particularly since, in many States, including Iowa, the limitations periods are considerably shorter than the 180-day period allowed grievants in nondeferral States.

Id. at 763 (citation omitted). More recently, the Court reached the same conclusion in the Title VII context. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 122-23 (1988) ("[S]tate time limits for filing discrimination claims do not determine the applicable federal time limit."). *See also Burnett v. Grattan*, 468 U.S. 42, 52-53 (1984) (quoting *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 367 (1977)). ("'State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.'")

Like the exhaustion provisions of the ADEA and Title VII, the exhaustion provision of the PLRA says nothing about the applicable statute of limitations. In fact, no provision of the PLRA mentions the statute of limitations.[3] As with the ADEA and Title VII, there is no basis to infer that Congress intended to subject prisoners' § 1983 lawsuits to the shorter time limitations imposed by the various prison grievance procedures. *Cf. Crawford-El v. Britton*, 523 U.S. 574, 596-97 (1998) ("If there is a compelling need to frame new rules of law [for prisoner lawsuits], presumably Congress either would have dealt with the problem in the [Prison Litigation] Reform Act, or will respond to it in future legislation.").

The reasoning underlying this Court's refusal to subordinate the ADEA and Title VII statutes of limitations to the state-imposed deadlines applies with even greater force in prisoner civil rights litigation. In the ADEA context, this Court reiterated that additional judicially-created procedural technicalities "are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Oscar Mayer*, 441 U.S. at 765 n.13 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 526-27 (1972)). The short deadlines at issue here would be a substantial problem in any administrative remedy system. They are especially problematic for the prison population, which is generally unknowledgeable about legal rights and procedures, poorly educated, and often functionally illiterate.

---

[3] Also, like the statute at issue in *Oscar Mayer*, the PLRA contemplates the possibility that a state may not have an administrative procedure for a prisoner to exhaust before filing a § 1983 claim. *See* 42 U.S.C. § 1997e(b) ("The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 3 or 5 of this Act.").

See U.S. Department of Education, *Literacy Behind Prison Walls* (1994), http://nces.ed.gov/pubs94/94102.pdf (last visited December 26, 2005) (reporting that seven out of ten prisoners perform at the lowest literacy levels). In addition, prisoners often must decide, under very tight timelines and in an environment that is fraught with explicit or implicit threats of retaliation and recriminations, whether to submit a grievance about the conduct of prison officials to those officials' cohorts on the grievance committee. These impediments only enhance the difficulty of navigating the short filing deadlines, which this Court recognized to be "a likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim." *McCarthy*, 503 U.S. at 153.

The PLRA applies to juveniles. *See Christina A. v. Bloomberg*, 315 F.3d 990, 994 (8th Cir. 2003) (holding that PLRA applies to juveniles detained in a state training school); *Lewis v. Gagne*, 281 F. Supp. 2d 429, 433 (N.D.N.Y. 2003) (holding that PLRA applies to juveniles adjudicated delinquent and confined to residential facility). Therefore, the short deadlines apply not only to adult prisoners, but also to juveniles. The impediments that adult prisoners face in navigating short filing deadlines—illiteracy, inexperience, lack of legal training and knowledge, and fear—would be magnified in the case of juvenile prisoners.

4. A procedural default rule significantly interferes with a prisoner's constitutional right of access to the courts, and places a particularly heavy burden on inmates who are underage, unsophisticated, illiterate, and/or inexperienced in filing prison grievances and lawsuits. Congress has not suggested that it intended such a result. In fact, such a result contradicts the stated intent of the PLRA. The legislative history of the PLRA vividly illustrates that the PLRA was intended to "prevent[] inmates from abusing the judicial system," but was not intended "to prevent inmates from

raising legitimate claims." 141 Cong. Rec. S14611 (1995) (statements of Sen. Hatch). While a procedural default rule may reduce the total number of prisoner lawsuits adjudicated in federal court, it is no more likely to eliminate frivolous suits than to eliminate meritorious constitutional claims.

III. The Court Should Not Import A Procedural Default Rule From Habeas Corpus Jurisprudence

1. The procedural default rule in the PLRA context is based on the inappropriate importation of habeas corpus principles into civil rights litigation. *See, e.g., Spruill v. Gillis*, 372 F.3d 218, 228-29 (3d Cir. 2004) (analogizing the habeas corpus exhaustion requirement to the PLRA exhaustion requirement). The importation of habeas corpus principles into the PLRA based on "the analogy" between habeas petitions and § 1983 actions, *see id.* at 228-29, belies the fact that the distinctions between the two areas of law are important and complex enough to have merited this Court's attention in no fewer than four opinions over the preceding seven years. *See Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005); *Nelson v. Campbell*, 541 U.S. 637 (2004); *Muhammad v. Close*, 540 U.S. 749 (2004); *Edwards v. Balisok*, 520 U.S. 641 (1997). While the Court has not specifically addressed the exhaustion requirements in these cases, the Court has suggested that the exhaustion requirements for habeas petitions are more stringent than the exhaustion requirements for PLRA actions. *See Muhammad*, 540 U.S. at 751 ("Federal petitions for habeas corpus may be granted only after other avenues of relief have been exhausted. Prisoners suing under § 1983, in contrast, generally face a substantially lower gate, even with the requirement of the Prison Litigation Reform Act of 1995 that administrative opportunities be exhausted first.") (citations omitted).

The rationale underlying this Court's adoption of the procedural default rule for habeas corpus petitions is inapplicable to § 1983 actions. In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Court recognized that procedural default is a distinct concept from administrative exhaustion. *Id.* at 732. In that case, the Court noted the purposes of the requirement in the habeas corpus context that state judicial remedies be exhausted: "'to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings.'" *Id.* at 731-32 (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). The Court then explained that a procedural default rule also furthers those purposes in the habeas context.

As this Court has explained, § 1983 challenges to the conditions of confinement do not raise the same concerns about the autonomy of state courts as habeas corpus challenges to the confinement itself. *See Wilkinson v. Dotson*, 125 S. Ct. 1242, 1249 (2005) (rejecting argument that permitting prisoner's § 1983 lawsuit without prior exhaustion of state-court remedies would compromise principles of federal-state comity). Thus, the fact that this Court held that a procedural default rule is necessary to protect state court powers in the habeas context does not spell the need for or justify such a rule in the PLRA context. Unlike state courts, the individuals processing prison grievances do not have "concurrent powers" with federal courts to enforce constitutional rights or the legal expertise to do so. *Id.* at 731 (quoting *Rose v. Lundy*, 455 U.S. at 518). In addition, the correctional officials processing inmates' grievances are not, in contrast to judges, independent adjudicators. *Cf. Cleavinger v. Saxner*, 474 U.S. 193, 203-04 (1985) (holding that members of prison disciplinary committee were not entitled to absolute immunity because "they were not truly independent" and "had no identification

with the judicial process of the kind and depth that has occasioned absolute immunity").

Prison grievance officials, unlike state courts, also lack a full arsenal of remedies, including injunctive relief and damages, with which to vindicate and enforce constitutional and other civil rights. *See* Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts, and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 518 (2001) (reporting survey results revealing that prisoners cannot obtain monetary relief through grievance procedures for most types of legal claims). *See also Booth v. Churner*, 532 U.S. 731, 741 n.5 (2001) (holding that prison grievance procedures do not have to satisfy even "minimum acceptable standards of fairness and effectiveness").

2. In contrast to the exhaustion requirement applicable in habeas corpus actions, the PLRA's administrative exhaustion requirement was neither designed nor intended to preserve the power of state courts, which have parallel authority and expertise to render decisions regarding the scope of constitutional and other legal rights. Rather, the purpose of the PLRA's exhaustion requirement is to improve the quality of prisoner lawsuits or avert the need for such lawsuits by affording prison officials an opportunity to address complaints internally prior to a federal lawsuit. The Court explained this in *Porter*:

> Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance might improve prison administration

> and satisfy the inmate, thereby obviating the need for litigation.

Porter, 534 U.S. at 524-25.

The Court's articulation of the rationale for the PLRA's exhaustion requirement echoes the Court's articulation of the rationale for the ADEA's exhaustion requirement. In *Oscar Mayer*, the Court explained:

> The [exhaustion requirement] is intended only to give state agencies a limited opportunity to settle the grievances of ADEA claimants in a voluntary and localized matter so that the grievants thereafter have no need or desire for independent federal relief.

Oscar Mayer, 441 U.S. at 761. The rationale for the PLRA's exhaustion requirement, like the rationale for the ADEA's requirement, is to provide state agencies the opportunity to address and perhaps resolve claims in order to eliminate the need for federal litigation. For example, the CDOC may reverse or lift its ban on the Respondent's participation in Bible study, perhaps prompting him to forgo a federal lawsuit. But, as this Court stated in *Oscar Mayer*, "[i]ndividuals should not be penalized if States decline, for whatever reason, to take advantage of these opportunities." *Oscar Mayer*, 441 U.S. at 761.

Because the procedural default rule proposed by Petitioners is not mandated by the language of the PLRA, does not advance the policies underlying the PLRA, is not warranted by an analogy to habeas corpus law, and would interfere significantly with a prisoner's constitutional right of access to the courts, this Court should decline Petitioners' invitation to impose such a rule. Congress, rather than the Court, should consider in the first instance the advisability and constitutionality of importing a procedural default rule

into the Civil Rights of Institutionalized Persons Act's exhaustion provision.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the court below.

Respectfully submitted.

MICHAEL S. GRECO*
President
American Bar Association

**Counsel of Record*

February 2, 2006

Supreme Court, U.S.
FILED
FEB 2 - 2006
OFFICE OF THE CLERK

No. 05-416

In The Supreme Court of the United States

JEANNE S. WOODFORD
and ANTHONY P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, LEGAL AID SOCIETY OF THE CITY OF NEW YORK, OHIO JUSTICE AND POLICY CENTER, PRISON LAW OFFICE, PRISONERS' LEGAL SERVICES OF NEW YORK, AND THE UPTOWN PEOPLE'S LAW CENTER AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

DAVID C. FATHI
ELIZABETH ALEXANDER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street N.W., 7th Floor
Washington, DC 20005
(202) 393-4930

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

STEVEN BANKS
JOHN BOSTON
THE LEGAL AID SOCIETY
199 Water Street
New York, NY 10038
(212) 577-3530

MARGO SCHLANGER
(Counsel of Record)
One Brookings Drive
St. Louis, MO 63130
(314) 935-8242

February 2, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF THE AMICI CURIAE 1
SUMMARY OF THE ARGUMENT 1
ARGUMENT 4
CONGRESS INTENDED 42 U.S.C. § 1997e(a) TO REQUIRE ADMINISTRATIVE EXHAUSTION OF PRISON CONDITIONS COMPLAINTS, NOT PROCEDURAL DEFAULT 4
A. Congressional intent, which has varied in different settings, determines whether a procedural default rule applies to a particular exhaustion requirement. 7
B. The PLRA's amendment to § 1997e(a) altered the scope of CRIPA's administrative exhaustion requirement, but left in place the effect of inmate procedural error. 10
1. Prior to the PLRA, § 1997e's administrative exhaustion regime was one that mandated deferral, not procedural default, of federal claims. 12
2. The PLRA indicates Congress's intent to broaden when administrative exhaustion is required—not to alter the effect of a prisoner's administrative procedural errors on subsequent federal litigation 16
a. Text 17
b. Committee reports and other legislative history 19
c. Another nearly simultaneous enactment 20
d. The habeas analogy 21
e. Overall congressional purpose 23
CONCLUSION 29

APPENDIX A: The Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247 § 7, 94 Stat. 349, 352-353 (1980) (42 U.S.C. § 1997e as originally enacted) 1a

APPENDIX B: Legislative History of the Administrative Exhaustion Provision of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e, Pub. L. No. 96-247 § 7, 94 Stat. 349, 352-353 (1980) 3a

APPENDIX C: Descriptions of the Amici Curiae 10a

TABLE OF AUTHORITIES

Cases

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) 25

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) 29

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 9

Boeing Co. v. United States, 537 U.S. 437 (2003) 1, 11

Booth v. Churner, 532 U.S. 731 (2001) 11, 16, 23

Brown v. Toombs, 139 F.3d 1102 (6th Cir. 1998), *cert. denied*, 525 U.S. 833 (1998) 5

Central Virginia Community College v. Katz, No. 04-885, ___ U.S. ___, 2006 WL 151985 (Jan. 23, 2006) 10

Coleman v. Thompson, 501 U.S. 722 (1991) 21

Crawford-El v. Britton, 523 U.S. 574 (1998) 29

Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002) 1, 11

Ex parte Royall, 117 U.S. 241 (1886) 22

Francis y. Henderson, 425 U.S. 536 (1976) 22

Giano v. Goord, 380 F.3d 670 (2d Cir. 2004) 7

Harper v. Laufenberg, No. 04-C-699-C, 2005 WL 79009 (W.D. Wis. Jan. 6, 2005) 27

Jackson v. District of Columbia, 254 F.3d 262 (D.C. Cir. 2001) 5

Keys v. Craig, No. 05-2285, 2005 WL 3304140 (3d Cir. Dec. 7, 2005) 26
Lindell v. O'Donnell, No. 05-C-04-C, 2005 WL 2740999 (W.D. Wis. Oct. 21, 2005) 26
Lindh v. Murphy, 521 U.S. 320 (1997) 20
Lorillard v. Pons, 434 U.S. 575 (1978) 1, 12
Love v. Pullman, 404 U.S. 522 (1972) 29
McCarthy v. Madigan, 503 U.S. 140 (1992) ..... passim
McKart v. United States, 395 U.S. 185 (1969) 8, 9
Murray v. Carrier, 477 U.S. 478 (1986) 21
Ngo v. Woodford, 403 F.3d 620 (9th Cir. 2005) 4, 7, 18
Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 9
O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 22
Patsy v. Board of Regents of Fla., 457 U.S. 496 (1982) ..... passim
Porter v. Nussle, 534 U.S. 516 (2002) 5, 11, 16, 23
Pozo v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002), *cert. denied*, 537 U.S. 949 (2002) 7, 22, 23
Riccardo v. Rausch, 375 F.3d 521 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 1589 (2005) 27
Richardson v. Spurlock, 260 F.3d 495 (5th Cir. 2001) 26
Robertson v. Wegmann, 436 U.S. 584 (1978) 25
Rodriguez v. United States, 480 U.S. 522 (1987) 28
Strong v. David, 297 F.3d 646 (7th Cir. 2002) 25, 26
Thomas v. Woolum, 337 F.3d 720 (6th Cir. 2003) 7
United States v. American Bldg. Maintenance Industries, 422 U.S. 271 (1975) 3, 21
Walker v. Maschner, 270 F.3d 573 (8th Cir. 2001) 6
Wendell v. Asher, 162 F.3d 887 (5th Cir. 1998) 5
Williams v. Hollibaugh, No. Civ. 3:04-CV-2155, 2006 WL 59334 (M.D. Pa. Jan. 10, 2006) 27

Federal Statutes and Regulations

28 U.S.C. § 2254(b)(1) 18, 22
42 U.S.C. § 1983 ..... passim

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) 3, 20, 21

§ 104, 110 Stat. 1219, 28 U.S.C. § 2254(e)(2) 20
§ 107, 110 Stat. 1223, 28 U.S.C. § 2264(a) 21

Civil Rights of Institutionalized Person Act, Pub. L. No. 96-247, 94 Stat. 349, 352-353 (1980) .... passim

§ 7(a), 42 U.S.C. § 1997e (1982) 2
§ 7(a), 42 U.S.C. § 1997e(a) (1982) 1, 10, 11, 16
§ 7(b), 42 U.S.C. § 1997e(b) (1982) 12, 13

As amended by Prison Litigation Reform Act, Pub. L. No. 104-134 § 803(d), 110 Stat. 1321, 1321-71 (1996) ..... passim

42 U.S.C. § 1997e(a) (current) ..... passim
42 U.S.C. § 1997e(c)(1) (current) 18
42 U.S.C. § 1997e(c)(2) (current) 2, 3, 17, 18

Office of Inmate Grievance Procedure Certification Standards for Inmate Grievance Procedures, 46 Fed. Reg. 3843-02 (Jan. 16, 1981) (codified at 28 C.F.R. § 40) 13

Pub. L. No. 103-322 § 20416, 108 Stat. 1796, 1834 (1994) 10

State Statutes and Regulations

Ill. Admin. Code tit. 20, § 504.810(b) (2006) 26

26 Ill. Reg. 18065, at § 504.810(b) (Dec. 27, 2002) 26

Rules of the Florida Dept. of Correction, Ch. 33-103.011(1)(a) 6

Other Authorities

122 Cong. Rec. 3925 (1976) 15

141 Cong. Rec. (1995)
p. 26,449 24
p. 26,553 24
p. 27,042 24
p. 27,044 24
p. 35,797 ..... 3, 24
p. 38,276 24

Civil Rights for Institutionalized Persons: Hearing on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 95th Cong. (1977) ... 14, 15

Civil Rights of Institutionalized Persons: Hearing on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong. (1977) 15

H.R. 667, 104th Cong. (1995) 19

H.R. 12008, 94th Cong. (1976) 15

Petitioner's Brief, *McCarthy v. Madigan*, 503 U.S. 140 (1992) (No. 90-6861) 10

Respondents' Brief, *McCarthy v. Madigan*, 503 U.S. 140 (1992) (No. 90-6861) 10

Richard J. Pierce, Jr., 2 Administrative Law Treatise 969 (4th ed. 2002) 8

S. 1495, 104th Cong. (1995) 24

Senate Report No. 96-416 (1979), *reprinted in* 1980 U.S.C.C.A.N. 787 14

James J. Stephan, U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of Jails, 1999* (Aug. 2001), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cj99.pdf 25

H.R. Rep. No. 104-21 (1995) 20

INTEREST OF THE AMICI CURIAE*

The amici curiae are organizations that advise and represent prisoners seeking to protect and promote their civil and constitutional rights. A description of each of the amici appears as Appendix C.

SUMMARY OF THE ARGUMENT

When Congress amended the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997e(a), with the 1996 Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, § 803, 110 Stat. 1321, 1321-71, it broadened the statute's coverage in several ways: exhaustion is now mandatory rather than discretionary; prisoners must now exhaust all available remedies, not just those that are "plain, speedy, and effective" under federal standards; and all federal cases concerning "prison conditions" are covered, not just § 1983 lawsuits. Compare 42 U.S.C. § 1997e(a) (current) with 42 U.S.C. § 1997e(a) (1982) (reprinted as App. A). What Congress did *not* change is the meaning of the administrative exhaustion required. See *Dep't of Housing and Urban Development v. Rucker*, 535 U.S. 125, 133 (2002) (when Congress amends a statute but does not indicate any change to a particular aspect of prior law, that aspect remains in place); *Boeing Co. v. United States*, 537 U.S. 437, 456 (2003) (same); *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978) (same). Currently, as previously, CRIPA's exhaustion provision governs the *timing*, not the *availability*, of federal court consideration of prison conditions lawsuits. No procedural default rule augments the exhaustion requirement in such cases.

---

* No counsel for any party authored any part of this brief. No persons or entities other than the amici curiae made any monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court.

Statutorily mandated exhaustion rules do not necessarily include procedural default components. Rather, as this Court held in *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 514 (1982), like other issues of the "design and scope of an exhaustion requirement," "what consequences should attach to the failure to comply with procedural requirements of administrative proceedings" is an issue for which "legislative purpose . . . is of paramount importance." *Id.* at 501; see also *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992).

As originally enacted, CRIPA exhaustion did not include a procedural default rule. That is, even if a prison or jail's grievance system had been certified "plain, speedy, and effective," untimely grievances did not forfeit inmates' chance for federal adjudication. Based on CRIPA's structure, purpose, and legislative history, it is clear that had Congress intended a procedural default regime, CRIPA would have specified that grievance deadlines, along with all the other aspects of grievance procedures, be reasonable. See 42 U.S.C. § 1997e (1982) (since amended) (reprinted in App. A).

Yet petitioners and their amici ask this Court to overrule Congress's decision in the PLRA to preserve its own prior approach. The text and legislative history of the PLRA itself both confirm Congress's intent not to mandate a procedural default rule. In the text of the current exhaustion provision, by instructing litigants that they may not file a federal lawsuit "until" they have given their prison or jail system a full chance to respond to their grievances, Congress implied that exhaustion is a timing issue—that is, that an inmate who has failed to exhaust is not permanently barred from federal court but will eventually be able to sue. In addition, § 1997e(c)(2)'s direction to district judges that when they find that a case is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief" they may dismiss it without "*first* requiring . . . exhaustion" (emphasis added) makes clear that Congress contemplated a different course for unexhausted cases that survive the judge's initial merits screening.

In such cases, § 1997e(c)(2) authorizes courts to "first requir[e] . . . exhaustion." Congress, that is, expressly anticipated that some unexhausted inmate complainants may fix this procedural problem and (if their complaints are not resolved administratively) proceed with their federal litigation.

In addition, just *two days* prior to passage of the PLRA's amendments to CRIPA, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 ("AEDPA"), which included not one but two provisions expressly prescribing procedural default components of federal review of state convictions. The AEDPA is particularly relevant to proper construction of the PLRA, "since both sections were enacted by the [same] Congress, and both were designed to deal with closely related aspects of the same problem," *United States v. American Bldg. Maintenance Industries*, 422 U.S. 271, 277 (1975)—Congress's unhappiness with the rules governing federal court consideration of claims by inmates. Congress's nearly simultaneous enactment of an express procedural default rule in AEDPA and silence on the subject in the PLRA speaks volumes.

Finally, the result petitioners and their amici seek runs counter to the PLRA's purpose. The 1996 statute's supporters repeatedly disclaimed any desire to impede valid federal claims. One the bill's main sponsors, Senator Hatch, even suggested that any interpretation to the contrary was hyperbole by the statute's opponents: "Indeed, I do not want to prevent inmates from raising legitimate claims. While the vast majority of these claims are specious, there are cases in which prisoners' basic civil rights are denied. Contrary to the charges of some critics, however, this legislation will not prevent those claims from being raised." 141 Cong. Rec. 35,797 (Dec. 7, 1995) (statement of Sen. Hatch). But a procedural bar would indeed "prevent inmates from raising legitimate claims." Moreover, it would create sharp incentives for prison and jail officials to promulgate demanding rules with short time limits and interpret them strictly, in order to shrink inmates' opportunity to file grievances. Indeed, these effects

can already be seen in regulations and in case law. And contrary to Congress's intent to withdraw federal regulation of prison and jail grievance procedures, a procedural default rule would entangle federal courts in prison and jail policy, by requiring them to pass judgment on the consistency of individual prison and jail grievance procedures with the imperatives of § 1997e and § 1983.

ARGUMENT

Congress Intended 42 U.S.C. § 1997e(a) to Require Administrative Exhaustion of Prison Conditions Complaints, Not Procedural Default.

The Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997e(a), as amended in 1996 by the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, § 803, 110 Stat. 1321, 1321-71 states, "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." In this case, there is no question that by the time he filed his lawsuit under 42 U.S.C. § 1983, the respondent, a California state prisoner who complains of restrictions preventing him from participating in religious, educational, and other prison programs, had exhausted all administrative remedies available. After an informal effort to resolve the dispute failed, respondent filed a grievance. When the prison Appeals Coordinator rejected the grievance as untimely under the prescribed 15-day deadline, respondent refiled, arguing that that rejection was erroneous because he was challenging a series of ongoing constitutional violations, including one within the prior 15 days. The State rejected this argument, and continued to refuse to entertain either his grievance or his two appeals. *Ngo v. Woodford*, 403 F.3d 620, 622 (9th Cir. 2005). No further administrative avenue of redress remains.

As this Court has held, 42 U.S.C. § 1997e(a) grants jail and prison administrators "time and opportunity to address

complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 525 (2002). California's administrators have chosen not to take that opportunity, yet the petitioners now ask this Court to deny the plaintiff the federal judicial forum to which § 1983 entitles him. Even assuming that the prison Appeals Coordinator did not err in refusing to take account of the ongoing nature of the restrictions about which respondent complains, § 1997e(a) does not immunize prison and jail officials from damages when inmates have sought in good faith to grieve a matter but have stumbled over a procedural rule.

Whether a jail or prison inmate's failure to comply perfectly with state, city, or county administrative grievance procedures requires forfeiture of his subsequent federal lawsuit is a question of congressional intent. In this case, that intent is clear: the administrative exhaustion provision of 42 U.S.C. § 1997e(a) is one that requires universal deferral, but not forfeiture, of federal court consideration.

For several years after the PLRA amended CRIPA, courts appear to have, *sub silentio*, followed this more natural reading of the language and purpose of § 1997e(a), dismissing cases without prejudice to allow inmate plaintiffs to exhaust administrative remedies, notwithstanding that—as the brief filed in support of respondent by Amicus Curiae Jerome N. Frank Legal Services Organization demonstrates—in nearly every state, exhaustion deadlines would have long since expired. See, e.g., *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998), *cert. denied*, 525 U.S. 833 (1998) (holding that because a prisoner plaintiff had failed to exhaust administrative remedies, "the case should be dismissed without prejudice, and the activity that the new statute contemplates should now occur—state adjudication of the claims"); *Wendell v. Asher*, 162 F.3d 887, 892 (5th Cir. 1998) ("we note that the dismissal of Wendell's claims in this case will not cause any injustice or render judicial relief unavailable"); *Jackson v. District of Columbia*, 254 F.3d 262, 270-271 (D.C. Cir. 2001) ("Because the prisoners failed to exhaust their administrative

remedies, the district court should have dismissed the complaint without prejudice, allowing the prisoners to refile once they have completed the VDOC grievance procedures."); *Walker v. Maschner*, 270 F.3d 573, 577 (8th Cir. 2001) (dismissing plaintiff's case without prejudice and noting, "However, Walker may file a claim in federal court once he has fully exhausted his prison remedies"). Under petitioners' reading of the statute there would have been no point to these many dismissals that allowed refiling, since those refiled complaints would have been procedurally barred.[1]

---

[1] In a census of State Department of Corrections administrative regulations, reported in their amicus brief, the Jerome N. Frank Legal Services Organization of the Yale Law School managed to assemble grievance procedures (often but not necessarily current) for every state system (except Alabama, whose grievance procedure the brief reports is currently under review) and the federal Bureau of Prisons. It found five states with initial deadlines for inmate grievances, "formal" or "informal," of two or three business or calendar days (Indiana, Michigan, Nebraska, Oklahoma, Rhode Island); four states with 5-day limits (Kentucky, Montana, New Mexico, North Dakota); four states with 7-day limits (Delaware, Tennessee, Utah, Wyoming); three states with 10-day limits (Arizona, Georgia, Massachusetts); sixteen states with 14 or 15-day limits (Arkansas, California, the District of Columbia, Hawaii, Idaho, Kansas, Maine, Maryland, Missouri, New York, Ohio, Pennsylvania, South Carolina, Texas, West Virginia, Wisconsin); and eight states with 30-day limits (Alaska, Colorado, Connecticut, Iowa, Mississippi, New Hampshire, Oregon, Virginia). Many of the states with 15- to 30-day limits require the inmate to have made an informal grievance during those several weeks. The federal Bureau of Prisons sets a 20-day deadline. Only four states (Illinois – 60 days; Louisiana – apparently 90 days, although the regulation is ambiguous; Nevada – six months; and North Carolina – 1 year) give inmates longer than 30 days to file grievances that may ripen into federal lawsuits. Six states (Florida, Minnesota, New Jersey, South Dakota, Vermont, Washington) do not specify deadlines in their regulations, although Florida requires prisoners to file their grievances in a "reasonable time," see Rules of the Florida Dept. of

Only after the Seventh Circuit's opinion in *Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002), *cert. denied*, 537 U.S. 949 (2002), marked the erroneous path did any Courts of Appeals adopt petitioners' flawed reading of § 1997e(a). But the circuit courts that have not followed *Pozo*—the Ninth Circuit in this case, *Ngo v. Woodford*, 403 F.3d 620 (9th Cir. 2005), the Sixth Circuit in *Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003), and the Second Circuit in *Giano v. Goord*, 380 F.3d 670, 677-678 (2d Cir. 2004)—are clearly correct in their refusal to graft a habeas-style procedural default bar onto the statute Congress enacted.

A. Congressional intent, which has varied in different settings, determines whether a procedural default rule applies to a particular exhaustion requirement.

"[L]egislative purpose . . . is of paramount importance in the exhaustion context." *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501 (1982), see also *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Primary reasons for this focus, the Court explained in *Patsy*, are the "difficult questions concerning the design and scope of an exhaustion requirement." 457 U.S. at 513. As the Court summarized, among those questions are:

> how to unify and centralize the standards for judging the kinds of administrative procedures that should be exhausted; what tolling requirements and time limitations should be adopted; . . . *what consequences should attach to the failure to comply with procedural requirements of administrative proceedings*; and whether federal courts could grant necessary interim injunctive relief and hold the action pending

---

Corrections, Ch. 33-103.011(1)(a). For details and sources, see Brief of Amicus Jerome N. Frank Legal Services Organization, Appendix. All the cited rules and regulations are available at http://www.law.yale.edu/Woodford.

> exhaustion, or proceed to judgment without requiring exhaustion even though exhaustion might otherwise be required, where the relevant administrative agency is either powerless or not inclined to grant such interim relief.

Id. at 514 (emphasis added).

Patsy's analysis simply cannot be squared with the erroneous suggestion by petitioners and the Solicitor General that Congress's unadorned use of the words "administrative remedies" and "exhausted" in 42 U.S.C. § 1997e(a) answers the question posed in this case—the effects of fully attempted exhaustion, where a prison or jail official has chosen to forego merits resolution because of an inmate's claimed procedural misstep. See, e.g., Petitioners' Brief at 14 ("Under this interpretation of the statutory language—that it is the administrative process that must be exhausted—the modifier 'available' can only refer to those administrative procedures that an inmate has a right to invoke before he has rendered those procedures obsolete by defaulting on them"); Brief of Amicus United States at 7 ("[I]t is well-settled that the exhaustion of remedies means the proper exhaustion of remedies, including compliance with applicable filing deadlines."); but see Brief of Amicus State of New York *et al.* ("the language of § 1997e(a) does not specifically address the issue"). The assertion that administrative exhaustion has a uniform meaning, regardless of its context, is obviously wrong.

Nor is *Patsy* alone in its support of this point. For example, in *McKart v. United States*, 395 U.S. 185 (1969), the case that "contains the Court's most comprehensive discussion of the exhaustion doctrine," Richard J. Pierce, Jr., 2 Administrative Law Treatise 969 (4th ed. 2002), the issue was almost precisely the same as in this case. The Court noted in *McKart* that it was "not faced with a premature resort to the courts—all administrative remedies are now closed to petitioner." 395 U.S. at 196-197. Rather, the issue in *McKart*, as here, was whether a party's procedural missteps in the administrative

process barred *judicial* review of the decision in question. The Court's answer was no: Notwithstanding the draftee's failure to appeal his reclassification, he was entitled to a de novo federal court hearing on that legal claim. The Court explained that while many of the reasons commonly thought to mandate a procedural default approach to administrative exhaustion "apply equally to cases like the present one," a procedural default rule would nonetheless be improper, because "[i]n Selective Service cases, the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created." *Id.* at 194, 195. See also *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 753 (1979) (holding that age discrimination plaintiff's untimely state administrative filing would not bar subsequent federal litigation).

The clear lesson of *McKart* and *Patsy* is that the present inquiry's keystone is not general theorizing about exhaustion but focused examination of Congress's intent, exhibited by the statutory structure, history, text, and purpose. In this case, that intent is clear: Congress's 1996 amendments to CRIPA were intended to strengthen prison and jail officials' opportunity to solve their own problems, not to compel federal courts to stand idle if those officials refuse to remedy constitutional violations simply because an inmate missed a grievance deadline.

The Solicitor General makes much of the fact that in *McCarthy v. Madigan*, this Court counted the potential for forfeiture of claims created by short administrative deadlines against the United States' plea that federal prisoners be required to exhaust administrative remedies prior to bringing damages actions under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Indeed, this Court did recognize in *McCarthy v. Madigan* what has proven to be true in circuits that have adopted the rule now proposed by petitioners and the United States: that such deadlines "are a likely trap for the inexperienced and unwary inmate." *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992). The dissent disagreed, but only "so long as there is an escape clause . . . and the time limit is

within a zone of reasonableness." *Id.* at 157-158 (Rehnquist, C.J., dissenting). Two points make this discussion less than persuasive authority for the Solicitor General's point. First, both the United States and the prisoner in *Madigan* urged the Court that procedural bar would follow from its adoption of the United States' position,[2] so the contrary approach was not presented to the Court. See 503 U.S. at 150 (rejecting "the rule of exhaustion *proposed* here") (emphasis added); *Central Virginia Community College v. Katz*, No. 04-885, ___ U.S. ___, 2006 WL 151985, at *4 (Jan. 23, 2006) ("we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated"). Second, in *Madigan*, the Court was considering a common law exhaustion regime, not a statutory one; the question in this case, but not that one, is of congressional intent.

B. The PLRA's amendment to § 1997e(a) altered the scope of CRIPA's administrative exhaustion requirement, but left in place the effect of inmate procedural error.

As this Court has described, prior to its 1996 amendment, § 1997e(a) set out looser rules governing administrative exhaustion by inmates. Enacted in 1980 and unchanged in pertinent part[3] until the PLRA's restrictive amendments, CRIPA originally interposed a "limited exhaustion requirement" on prisoners' § 1983 claims. *McCarthy v. Madigan*, 503 U.S. 140, 150 (1992). In particular, as originally enacted, CRIPA

---

[2] Petitioner's Brief at 7, 9 & Respondents' Brief at 38, n.18, McCarthy v. Madigan, 503 U.S. 140 (1992) (No. 90-6861).

[3] The only change to the statute's original language prior to the PLRA's 1996 amendment was in 1994, when Congress substituted "exceed 180 days" for "exceed ninety days" in 1997e(a)(1); inserted "or are otherwise fair and effective" at the end of 1997e(a)(2) and 1997e(c)(1); and inserted "or is no longer fair and effective" at the end of 1997e(c)(2). Pub. L. 103-322 § 20416, 108 Stat. 1796, 1834 (1994).

authorized (but did not compel) district judges who "believe[d] that such a requirement would be appropriate and in the interests of justice" to continue inmates' § 1983 actions "in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available," where either "the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b)." 42 U.S.C. § 1997e(a)(1), (a)(2) (1982) (since amended) (reprinted in App. A).

In 1996, Congress passed the PLRA, which amended CRIPA; as the Court has twice explained, the new language of the provision broadens it to cover not only § 1983 lawsuits but *all* federal law "action[s] . . .with respect to prison conditions." 42 U.S.C. § 1997e(a). Moreover, the language requiring exhaustion is now mandatory, not discretionary, and there is no certification prerequisite. See *Booth v. Churner*, 532 U.S. 731, 739 (2001); *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

While Congress in the PLRA thus broadened the exhaustion requirement in prison and jail conditions cases, and made its application mandatory, it did not mandate the procedural default rule petitioners seek. In reshaping CRIPA's exhaustion requirement, then, Congress did not hesitate to supersede its earlier approach, or to overrule judicial interpretations of the original text. See *Booth v. Churner*, 532 U.S. at 740-741 (describing the PLRA's apparent rejection of the Court's approach in *McCarthy v. Madigan*). There is, however, a prior statutory outcome that Congress showed no sign of altering: the rule that in the correctional setting administrative exhaustion concerns *when*, not *whether*, federal adjudication is available. As this Court has held, amendment of a statute leaves standing the interpretation and regulatory implementation of unamended statutory components, see *Dep't of Housing and Urban Development v. Rucker*, 535 U.S. 125, 133 n.4 (2002); *Boeing Co. v. United States*, 537 U.S. 437, 457 (2003). In this case, the *expressio unius* inference is stronger

yet. In the just-cited cases, the inference is based on a presumption that Congress knows of the interpretation or regulation in question, see *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). Here, no such presumption is necessary; it was Congress itself that created the no-procedural-default administrative exhaustion regime in CRIPA. Congress's judgment to preserve its own prior approach deserves this Court's respect.

1. Prior to the PLRA, § 1997e's administrative exhaustion regime was one that mandated deferral, not procedural default, of federal claims.

CRIPA's original stance on the procedural default issue was clear. The exhaustion rule applied only if a prison or jail's grievance system had been certified "plain, speedy, and effective," but even then, untimely grievances did not forfeit inmates' chance for federal adjudication. We know this most especially because of the text of former § 1997e(b), which directed the Attorney General to "promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility," 42 U.S.C. § 1997e(b)(1) (1982) (since amended) (reprinted in App. A), and set quite detailed rules governing fair prison and jail grievance systems, including the requirement of time limits binding the prison or jail system—without breathing a hint of concern about *inmate* filing deadlines.[4]

---

[4] The statute stated:

The minimum standards shall provide--

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

Similarly, the Attorney General's subsequently promulgated standards engaged in a comprehensive discussion of grievance mechanics, again with no mention of inmate filing deadlines. Office of Inmate Grievance Procedure Certification Standards for Inmate Grievance Procedures, 46 Fed. Reg. 3843-02 (Jan. 16, 1981) (codified at 28 C.F.R. § 40). It simply cannot be that the Congress that worried about grievance system fairness and responsiveness enough to promulgate requirements like deadlines for official reply and an advisory role for inmates would have designed a system in which inmate deadlines were both unregulated and dispositive as to the availability of a federal court forum for civil rights cases.[5]

The reason for this universal lack of concern about the unfair hindrance that deadlines and other technicalities might pose to inmates in the grievance process is that it was simply not in anyone's mind that untimely or otherwise technically flawed grievance filing would create any greater risk to a

---

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

42 U.S.C. § 1997e(b)(2) (1982) (since amended) (reprinted in App. A).

[5] The fact that prior to the PLRA, § 1997e(a)(1) (1982) (reprinted in App. A) directed courts to "continue" cases pending exhaustion—despite the fact that such claims would almost invariably be past the administrative time limit—provides some confirmation of the point that Congress thought even untimely exhaustion would suffice. But it is mere confirmation; that exhaustion was a rule sometimes deferring but never forfeiting federal adjudication does not chiefly derive from a particular word in CRIPA's text.

would-be inmate plaintiff than the ordinary risk that staleness renders relief less likely for the party with the burden of persuasion. The inescapable inference of CRIPA's omission of discussion of procedural default, waiver, or forfeiture—including its otherwise inexplicable failure to regulate grievance filing deadlines—is that no default was intended. Had Congress intended a procedural default regime, CRIPA would have specified that grievance deadlines be reasonable.

Moreover, CRIPA's legislative record supports the non-default reading. The grievance provision of CRIPA was hotly debated for over three years in House and Senate subcommittees, committees, and on the floor of both chambers.[6] In all of that record, proponents and opponents of administrative exhaustion alike discussed its likely impact as reducing the federal courts' inmate docket by resolving a proportion of complaints,[7] and *delaying* federal court consideration of the remainder.

For example, in a letter from Rep. Timothy E. Wirth to the Chairman of the relevant subcommittee, Rep. Kastenmeier, included in the hearing record, Rep. Wirth wrote of his constituents' "concern[] that this [exhaustion] clause could hold up any action to remedy an unjust situation for an unlimited amount of time and thus, negate the value of such legislation." *Civil Rights for Institutionalized Persons: Hearing on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm.*

---

[6] A complete list of the many dozens of references to administrative exhaustion in the hearings and debates over the bills that became CRIPA is provided as Appendix B to this brief.

[7] See, e.g., Senate Report No. 96-416, at 34 (Nov. 15, 1979) ("The almost 10,000 prisoner suits brought to court in 1978 are swamping our judges. . . . Requiring the exhaustion of in-prison grievances should resolve some cases thereby reducing the total number and help frame the issues in the remaining cases so as to make them ready for expeditious court consideration."), *reprinted in* 1980 U.S.C.C.A.N. 787, 816.

on the Judiciary, 95th Cong. 520 (1977) ("1977 House Hearing"). Many witnesses opposing the enactment of the exhaustion provision expressed similar concerns. See, e.g., *Civil Rights of Institutionalized Persons: Hearing on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong. 111 (1977) ("1977 Senate Hearing") (written testimony of David S. Garcia, Staff Worker, Mental Health Advocacy Project, Los Angeles; Former Patient, Metropolitan State Hospital) (opposing exhaustion provision because it would be inconsistent with the "necess[ity] to investigate and redress violations in a timely fashion"); *id.* at 210 (oral testimony of Prof. Ivan Bodensteiner) ("Another reason not to require exhaustion is that it can often cause very harmful delay prejudicial to the rights of the individuals involved."); *id.* at 571 (statement of the Prisoner Assistance Project of the Baltimore Legal Aid Bureau, Inc.) ("An exhaustion requirement would needlessly delay, for an excessive period of time, the prisoner's right to proceed in federal court."). Others, supporting the bill, agreed that its danger was the prospect of delay of federal litigation, though they were more sanguine about the result of that delay. See, e.g., 1977 House Hearing, *supra*, at 514 (letter from Prof. Richard Singer to Rep. Rodino) ("I believe that the guidelines and safeguards written into the bill are sufficient, if properly implemented, that the prospect of dilatory tactics will be minimal.").

Had procedural *default* been contemplated, mere *delay* would not have received nearly so much attention. But there is simply no sign in the entire legislative record that an inmate's procedural misstep in the administrative process might forfeit federal court consideration of his claim. Instead, the exhaustion provision's proponents were at pains to emphasize that it would *not* impair the right to bring a lawsuit. See, e.g., 122 Cong. Rec. 3925 (Feb. 19, 1976) (statement of Rep. Railsback) (introducing the exhaustion provision's first appearance in proposed legislation, H.R. 12008, 94th Cong. (1976), and explaining, "[i]t should be stressed that the ex-

haustion requirement does not deny prisoners access to Federal courts in section 1983 suits. . . . A prisoner unsatisfied with the administrative decision would be permitted to file a section 1983 suit"). See also 1977 House Hearing, *supra*, at 856 (letter from Prof. Frank J. Remington, following up on another witness's report of Prof. Remington's views during the hearing) ("[An exhaustion] requirement does not in any way preclude his [the inmate's] opportunity to ask for federal court review of the administrative decision.").

2. The PLRA indicates Congress's intent to broaden *when* administrative exhaustion is required—not to alter the effect of a prisoner's administrative procedural errors on subsequent federal litigation.

CRIPA's current form "differs markedly" from its original incarnation. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Exhaustion is now mandatory rather than discretionary; prisoners must now exhaust all available remedies, not just those that are "plain, speedy, and effective" under federal standards; and all inmates (federal, state, local, and juvenile) are now covered for all federal cases concerning "prison conditions," not just § 1983 lawsuits. Compare 42 U.S.C. § 1997e(a) (current) with 42 U.S.C. § 1997e(a) (1982) (reprinted as App. A). Each of these changes, however, goes to *whether* exhaustion is required—not the effect in federal litigation of a prison or jail system's prior decision on procedural grounds to decline to entertain a grievance. Two of these important changes were the subject of the two prior post-PLRA inmate exhaustion cases this Court has decided. In both, the Court insisted on the importance of Congress's intent. See *Porter*, 534 U.S. at 524-530; *Booth*, 532 U.S. at 739-741. In this case, too, it is Congress's *actual* amendment of CRIPA by the PLRA to which this Court should give effect.

Nothing in either the text or the legislative history of that amendment demonstrates, or even hints at, a congressional alteration of the effect on federal litigation of procedural missteps by inmates pursuing administrative remedies. Rather,

Congress chose to leave the prior approach in place. As previously noted, amendment of a statute leaves standing the interpretation and regulatory implementation of unamended statutory components; a fortiori, in a case like this one where it was Congress itself that created the no-procedural-default administrative exhaustion regime in CRIPA, its judgment to preserve its own prior approach deserves this Court's respect.

a. Text. As the brief filed by a number of States as amici in support of the petitioners concedes, see Brief of Amicus State of New York *et al.* at 2 ("the language of § 1997e(a) does not specifically address the issue"), the current text of 42 U.S.C. § 1997e(a) does not speak directly to what happens in federal court when a prison or jail system fails to review a grievance's merits because it finds a procedural flaw. But even read without the context of CRIPA's history, the text of § 1997e as amended by the PLRA confirms the reading of the inmate administrative exhaustion rule as governing the timing, not the availability, of federal adjudication.

The statute provides in pertinent part:

> (a) **Applicability of administrative remedies**. No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.
>
> * * *
>
> (c) **Dismissal**
>
> * * *
>
> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

42 U.S.C. § 1997e. Two words are key—"until" in § 1997e(a), and "first," in § 1997e(c)(2). Both signal Con-

gress's intent that this provision govern timing, not availability, of federal adjudication.

First, by instructing litigants that they may not file a federal lawsuit "until" they have given their prison or jail system a full chance to respond to their grievances, Congress implied that exhaustion is a timing issue—that is, that an inmate who has failed to exhaust is not permanently barred but will eventually be able to sue. See *Ngo v. Woodford*, 403 F.3d 620, 628 (9th Cir. 2005) (emphasizing difference between § 1997e(a)'s use of "until" and 28 U.S.C. § 2254(b)(1)(A)'s use of "unless").

In addition, § 1997e(c)(2)'s direction to district judges that when they find that a case is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief" they may dismiss it without "*first* requiring . . . exhaustion" (emphasis added) makes clear that Congress contemplated a different course for unexhausted cases that survive the judge's initial merits screening. In such cases, § 1997e(c)(2) authorizes courts to "first requir[e] . . . exhaustion." Congress, that is, expressly anticipated that some unexhausted inmate complainants may fix this procedural problem and perhaps (if their complaints are not resolved administratively) proceed with their federal litigation. Congress's intent in this regard would be foiled by petitioners' procedural default approach, because the vast majority of correctional grievance systems set time limits on inmate complaints that would make such a post-filing fix untimely. In nearly every prison and jail, grievance deadlines are simply too short. See *supra* note 1.

Finally, had Congress intended the reading now proposed by petitioners and their amici, it would have been natural for Congress to include, as it did not, "failure to exhaust properly" in the list of legal flaws that merit dismissal of prison conditions suits, which the very same section of the PLRA inserted into the very same section of CRIPA. See 42 U.S.C.

§ 1997e(c)(1): "The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." Pub. L. No. 104-134, § 803(d).

In short the PLRA's text supports the argument that the administrative exhaustion regime governing inmate litigation requires universal recourse to administrative remedies by inmate would-be plaintiffs, but does not hold their federal claims waived by technical error in the administrative grievance process.

b. Committee reports and other legislative history. There is only one relevant legislative committee report, about H.R. 667, 104th Cong. (1995), the bill whose Titles II and III, with some alterations, became the PLRA. That report, too, suggests that the PLRA's supporters intended to broaden the applicability and shift the timing of the pre-amendment CRIPA exhaustion requirement, not change its nature. In this earlier version of the PLRA, the bill did not propose to extend CRIPA's exhaustion requirement to non-§ 1983 actions, or to grievance systems not certified as "fair, speedy, and effective." But otherwise the operative language of its exhaustion provision was identical to the statute enacted: it would have eliminated CRIPA's prior textual reference to "continu[ance]" and substituted "no action shall be brought . . . until such . . . administrative remedies as are available are exhausted." H.R. 667 § 201. Yet the House Judiciary Committee Report on H.R. 667 describes the difference between extant requirements and those H.R. 667 would have effectuated as relating to the timing of the exhaustion requirement, not the effect in litigation of administrative procedural failures: "Currently, the Civil Rights of Institutionalized Person Act authorizes federal courts to suspend civil rights suits brought by prison-

ers pursuant to 42 U.S.C. sec. 1983 for 180 days while the prisoner exhausts available administrative remedies. This section requires prisoners to exhaust all available administrative remedies before filing a civil rights action in a federal court." H. Rep. No. 104-21, at 22 (1995). Moreover, the Committee wrote: "First, it requires that all administrative remedies be exhausted prior to a prisoner initiating a civil rights action in court. Second, it requires the court to dismiss any prisoner suit if it fails to state a legitimate claim of a violation for which relief can be granted, or if the suit is frivolous or malicious." *Id.* at 7. That is, the Committee's explanation, like the resulting statute, treats exhaustion separately from the question of which prison lawsuits fail to merit relief.

c. Another nearly simultaneous enactment. In addition, the 1996 Congress was well aware of the variety of extant approaches to exhaustion and of its crucial role in specifying precisely what regime it intended. Indeed, just *two days* prior to passage of the PLRA's amendments to CRIPA, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), which included not one but two provisions specifically prescribing procedural default components of federal review of state convictions. In that Act, Congress amended 28 U.S.C. § 2254(e)(2) to specify, "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows [one of two limited exceptions]." AEDPA § 104, 110 Stat. 1214, 1218. And Congress also provided that (in certain specified circumstances[8]) "[w]henever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been

---

[8] 28 U.S.C. § 2264(a) applies only to States that meet "certain conditions, including provision for appointment of postconviction counsel in state proceedings." *Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

raised and decided on the merits in the State courts, unless the failure to raise the claim properly [falls under one of three narrow exceptions]." 28 U.S.C. § 2264(a), AEDPA § 107, 110 Stat. 1214, 1223. Unlike 42 U.S.C. § 1997e(a), both of these provisions expressly enact procedural default principles. Congress's silence on the subject in the PLRA speaks volumes.

Indeed, the AEDPA is particularly relevant to proper construction of the PLRA, because "both sections were enacted by the [same] Congress, and both were designed to deal with closely related aspects of the same problem," *United States v. American Bldg. Maintenance Industries*, 422 U.S. 271, 277 (1975)—Congress's unhappiness with the rules governing federal court consideration of claims by inmates. Just as the Court has effectuated the express habeas procedural default rules in AEDPA, the Court should effectuate Congress's decision *not* to interject a procedural default rule into CRIPA exhaustion.

d. The habeas analogy. Petitioners and their amici argue that § 1997e(a)'s word "exhausted" can properly be analogized to the procedural default doctrine governing habeas corpus. See Petitioners' Brief at 26-30; Brief of Amicus United States at 12-15; Brief of Amicus New York *et al.* at 18-20. But Congress showed no sign in the PLRA of incorporating habeas doctrine in particular into CRIPA exhaustion; even if it did so intend, one can only assume that the habeas doctrine it incorporated was the one to which it referred, exhaustion, not procedural default.

It is true, as petitioners and their amici suggest, that in the habeas area this Court has followed a strict procedural default approach. Petitioners seeking a federal writ of habeas corpus generally forfeit claims they failed to present properly to state courts, see, e.g., *Coleman v. Thompson*, 501 U.S. 722 (1991), unless they can show "cause and prejudice" for the default, *Murray v. Carrier*, 477 U.S. 478, 485-492 (1986), or that "a

fundamental miscarriage of justice" would result from its enforcement, *id.* at 495-497.

But it is implausible that Congress meant in 42 U.S.C. § 1997e(a) to incorporate habeas doctrine in particular, given that habeas doctrine requires exhaustion of state judicial review opportunities, not "administrative remedies"; the absence of any other textual or historical hint that Congress meant to analogize to habeas doctrine; and the many other settings in which statutes require administrative exhaustion. Part and parcel of the Court's insistence that the "design and scope" of exhaustion requirements derive from specific legislative text and purpose, *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 513 (1982), is that such wholesale incorporation should not simply be assumed. Moreover, even if Congress *did* intend exhaustion under § 1997e(a) to particularly reflect habeas doctrine, the obvious reference would be the habeas doctrine of *exhaustion*, not the habeas doctrine of procedural default.[9]

---

[9] While procedural default in the habeas context is obviously closely connected to administrative exhaustion, the Court has insisted that the two remain distinct; they work in harmony, not in unison. Most recently, in *O'Sullivan v. Boerckel*, the Court took pains to note, "We do not disagree with Justice Stevens' general description of the law of exhaustion and procedural default. Specifically, we do not disagree with his description of the interplay of these two doctrines." 526 U.S. 838, 848 (1999). Justice Stevens in turn distinguished between "two analytically distinct judge-made rules: (1) the timing rule, first announced in *Ex parte Royall*, 117 U.S. 241 (1886), and later codified at 28 U.S.C. § 2254(b)(1), that requires a state prisoner to exhaust his state remedies before seeking a federal writ of habeas corpus; and (2) the waiver, or so-called procedural default, rule, applied in cases like *Francis v. Henderson*, 425 U.S. 536 (1976), that forecloses relief even when the petitioner has exhausted his remedies." *Id.* at 850 (Stevens, J., dissenting). Moreover, even if the Seventh Circuit were correct in *Pozo v. McCaughtry*'s aggressive reading of *O'Sullivan v. Boerckel*, in which the court of appeals erroneously held that *Boerckel* drasti-

Moreover, the federalism concerns underlying habeas exhaustion, which center around concerns of comity between the judicial systems of coordinate sovereigns, simply are not applicable either to the substance of complaints about prison or jail conditions or to the kinds of informal, not-even-quasi-judicial administrative procedures that are most typical in the Nation's prisons and jails for resolving grievances that cover topics from food to medical care to religion to discipline.

e. Overall congressional purpose. Congress's choice not to draft a procedural default rule makes eminent sense, because such a provision would undermine rather than further the purpose of the PLRA. Twice in the past several years, this Court has examined that purpose in detail. Most recently, it explained:

> Beyond doubt, Congress enacted §1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation. *Booth*, 532 U.S., at 737. In other instances, the internal review might "filter out some frivolous claims." *Ibid.* And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy. See *ibid.*; see also *Madigan*, 503 U.S., at 146.

Porter v. Nussle, 534 U.S. 516, 524-525 (2002).

---

cally reworked habeas procedural default and habeas exhaustion to render them essentially one and the same, 286 F.3d 1022, 1024 (7th Cir. 2002), *cert. denied*, 537 U.S. 949 (2002), that purported reworking postdated the PLRA's amendment to CRIPA by over three years and therefore could not have been in Congress's mind.

Consistent with the Court's description in *Porter*, the PLRA's supporters repeatedly denied any effort to impede valid federal claims. For example, when he introduced one version of the PLRA in the Senate, Senator Kyl stated: "If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners." 141 Cong. Rec. 38,276 (Dec. 21, 1995) (statement introducing S. 1495, 104th Cong.; § 101 was an exhaustion provision). Senator Hatch even suggested that any interpretation to the contrary was hyperbole by the statute's opponents: "Indeed, I do not want to prevent inmates from raising legitimate claims. While the vast majority of these claims are specious, there are cases in which prisoners' basic civil rights are denied. Contrary to the charges of some critics, however, this legislation will not prevent those claims from being raised." 141 Cong. Rec. 35,797 (Dec. 7, 1995) (statement of Sen. Hatch); see also 141 Cong. Rec. 27,042 (Sept. 29, 1995) (similar statement of Sen. Hatch); *id.* at 27,044 (statement of Sen. Thurmond) (PLRA would continue to allow "meritorious claims to be filed").

Instead, the PLRA was preeminently a statute about returning first responsibility for prison and jail conditions to prison and jail administrators. As the statute's chief sponsor in the Senate explained, "we must curtail interference by the Federal courts themselves in the orderly administration of our prisons. This is not to say that we will have no court relief available for prisoner suits, only that we will try to retain it for cases where it is needed while curtailing its destructive use." 141 Cong. Rec. 26,449 (Sept. 26, 1995) (statement of Sen. Abraham); see also 141 Cong. Rec. 26,553 (Sept. 27, 1995) (statement of Sen. Hatch) ("We believe . . . that it is time to . . . return . . . control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners."); 141 Cong. Rec. 27,042 (Sept. 29, 1995) (similar statement of Sen. Hatch).

Yet the reading petitioners seek would inevitably place federal courts into the very regulatory posture Congress was

trying to alter, forcing those courts to decide whether a given prison or jail unjustifiably hindered an inmate plaintiff's access to its grievance system. For example, the Seventh Circuit, originator of the procedural default rule, has noted that grievance regulations operate under a "constraint": "no prison system may establish a requirement inconsistent with the federal policy underlying § 1983 and § 1997e(a). See *Robertson v. Wegmann*, 436 U.S. 584 (1978)." *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002). As this Court held in *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648 (1990), state "provisions [that] cannot be viewed as permissible interstitial regulation in the service of, or at least neutral with respect to, the purposes of the federal scheme" are impermissible. If procedural default is interjected into the statute Congress wrote, it will become necessary for federal courts to examine whether onerous prison and jail procedures—short deadlines, difficult pleading requirements, and the like—are or are not "neutral," in these terms.

More important, far from encouraging administrative handling of the sometimes frivolous but sometimes extremely serious complaints of inmates, petitioners' proposed rule would actually provide an incentive to administrators in the state and federal prison systems and the over 3000 county and city jail systems[10] to fashion ever higher procedural hurdles in their grievance processes. After all, the more onerous the grievance rules, the less likely a prison or jail, or staff members, will have to pay damages or be subjected to an injunction in a subsequent lawsuit. Already there is evidence that prisons and jails are heading in this direction. For example, in July 2002, in *Strong v. David*, 297 F.3d 646 (7th Cir. 2002), the Seventh Circuit reversed the district court's dismissal of a case for failure to exhaust; in rejecting the defendants' argument that the plaintiff's grievances were

---

[10] James J. Stephan, U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of Jails, 1999*, at 5 (Aug. 2001), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cj99.pdf.

insufficiently specific, the court noted that the Illinois prison grievance rules were silent as to the requisite level of specificity. Less than six months later, the Illinois Department of Corrections proposed new regulations that provided:

> The grievance shall contain factual details regarding each aspect of the offender's complaint including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint.

Ill. Admin. Code tit. 20, § 504.810(b) (2006); see 26 Ill. Reg. 18065, at § 504.810(b) (Dec. 27, 2002) (proposing amendment).[11]

As *Strong v. David* demonstrates, lateness is not the only issue in exhaustion cases. Wardens and sheriffs routinely refuse to engage inmate grievances because grievants commit minor technical errors, such as using the incorrect form, see, e.g., *Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001); sending the right documentation to the wrong official, see, e.g., *Keys v. Craig*, No. 05-2285, 2005 WL 3304140, at *1 (3d Cir. Dec. 7, 2005);[12] failing to name a relevant official

---

[11]Indeed, the rules can be even more onerous than they appear; given the monetary and other stakes, prison and jail systems have been, unsurprisingly, extraordinarily rigid in their invocation of their procedural rules. Moreover, some district courts have held that administrative decisions of untimeliness are beyond the permissible bounds of federal reexamination. See, e.g., *Lindell v. O'Donnell*, No. 05-C-04-C, 2005 WL 2740999, at *18 (W.D. Wis. Oct. 21, 2005) (rejecting plaintiff's request that the court "find that prison officials wrongly applied Wisconsin regulations regarding the time limits for filing an inmate complaint" as "not a challenge federal courts may address").

[12]In *Keys*, the Third Circuit affirmed the district court's dismissal of a pro se inmate's lawsuit, finding that he had successfully reached the third level of administrative review, but then defaulted because he failed to attach copies of required documents. The plaintiff conceded that he had submitted the third-level appeal without the documents; he explained that his prison took two weeks

in the complaint (even if prison administrators have actual knowledge of that official's role in the incident), see, e.g., *Williams v. Hollibaugh*, No. Civ. 3:04-CV-2155, 2006 WL 59334, at *5-*6 (M.D. Pa. Jan. 10, 2006); or failing to file separate forms for each complaint, even if the interpretation of a single claim as raising two separate complaints is the prison administration's, *Harper v. Laufenberg*, No. 04-C-699-C, 2005 WL 79009, at *3 (W.D. Wis. Jan. 6, 2005).[13]

The Court's adoption of a procedural default principle would likely aggravate the problem. In fact, even when prison and jail administrators *want* to resolve a complaint on its merits, the approach petitioners and their amici ask this Court to take discourages them from doing so, and therefore actually undermines the very interest in self-governance they assert and that Congress intended to serve. The Seventh Circuit has held squarely that "when a state treats a filing as timely and resolves it on the merits, the federal judiciary will not second-guess that action, for the grievance has served its function of alerting the state and inviting corrective action." *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004), *cert. denied*, 125 S.Ct. 1589 (2005). In that case, the Illinois Department of Corrections' discretionary decision to review, on

---

to make the requisite copies. The Court of Appeals found that his late documentary submission was inadequate because made to the wrong prison official.

[13] In *Harper*, the inmate plaintiff complained in a medical grievance, within the prescribed 14 days, that a correctional officer had encouraged him to attempt suicide. Prison staff construed the complaint to raise two issues – "a claim relating to his failure to receive mental health treatment for his suicidal thoughts and a claim relating to defendant Laufenberg's alleged insensitive and unprofessional remarks." *Id.* at *3. The grievance was thus deemed noncompliant with the Wisconsin Administrative Code's rule limiting grievances to one issue. Thirteen days later the plaintiff resubmitted his complaint; it was rejected as untimely; plaintiff properly appealed. The district court dismissed the case for untimeliness in the attempt to exhaust.

the merits, an untimely failure-to-protect grievance in an in-cell rape case nearly cost the state $1.5 million; a jury verdict for that amount was reversed on the merits (over a panel dissent and three judges' dissents from denial of rehearing en banc). Had the state simply rejected the grievance as time-barred—as it appears it could have—the monetary risk to state officials would have been entirely obviated. Can anyone reasonably expect a governmental agency to resist this kind of incentive to avoid merits consideration of grievances? The officials in question are a varied group—elected jailers and sheriffs, appointed jail superintendents, professional wardens, politically appointed commissioners. What they all have in common is an understandable interest in avoiding adverse judgments against themselves or their colleagues, in their official or personal capacities.

In short, petitioners seek authorization to set up pleading traps and procedural hurdles for would-be civil rights plaintiffs. This Court should deny that request as entirely inconsistent with the statute Congress wrote, which this Court has found was intended to give prison officials a chance to solve problems and head off litigation, not to multiply the procedural pitfalls for lay persons seeking to vindicate their civil rights. Even if the broadest purpose of the Prison Litigation Reform Act was anti-prison litigation—a characterization resisted by its supporters, who insisted they were not hostile to meritorious claims—this Court has cautioned:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-526 (1987) (per curiam). As Justice Scalia has explained, " 'The Act must do everything necessary to achieve its broad purpose' is

the slogan of the enthusiast, not the analytical tool of the arbiter." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting).

"Prisoner suits under 42 U.S.C. § 1983 can illustrate our legal order at its best and its worst." *Crawford-El v. Britton*, 523 U.S. 574, 601 (1998) (Kennedy, J., concurring). In the PLRA, Congress undertook a limited reform of CRIPA's exhaustion requirement, not to frustrate federal adjudication of prisoners' claims but to enhance that consideration. Like the Court, Congress knows that "even as to prisoners the government must obey always the Constitution." *Id.* This Court should not assume, without support in either text, structure, or history, that Congress intended to undermine the judicial remedies that enforce the government's obligation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed. If, however, this Court rejects the view just presented and holds that 42 U.S.C. § 1997e(a)'s exhaustion requirement does include a procedural default component, it should hold that such a rule must be tailored to the statutory scheme of the civil rights statutes and CRIPA as amended by the PLRA. In particular, it should recognize that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process," *Love v. Pullman*, 404 U.S. 522, 526 (1972), and remand for decision on the many complex issues raised by a rule of procedural default in the context of prison and jail grievance systems and their often draconian deadlines. Should the ongoing nature of the harm alleged by the plaintiff render his grievance timely? Is the state's resolution of that issue (via regulation or administrative decision) dispositive or is the issue a legal one subject to de novo adjudication in the federal court? Is the standard one of good faith effort to com-

ply with administrative requirements? Substantial compliance? Does a plaintiff's reasonable belief as to the requirements of the grievance system control, or are jail and prison inmates to be penalized for reasonable misunderstandings or based on officials' post hoc interpretations of their rules? These are questions the courts of appeals have only begun to ask and answer. If the Court institutes a procedural default regime, it should allow the court of appeals to assess the application and appropriate resolution of these questions in the first instance in this case.

Respectfully submitted,

David C. Fathi
Elizabeth Alexander
American Civil Liberties Union Foundation
915 15th St. N.W., 7th Floor
Washington, DC 20005
(202) 393-4930

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Steven Banks
John Boston
The Legal Aid Society
199 Water Street
New York, NY 10038
(212) 577-3530

Margo Schlanger
(*Counsel of Record*)
One Brookings Drive,
CB 1120
St. Louis, MO 63130
(314) 935-8242

February 2, 2006

APPENDIX A

The Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247 § 7, 94 Stat. 349, 352-353 (1980) (42 U.S.C. § 1997e as originally enacted)

EXHAUSTION OF REMEDIES.

(a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).

(b)(1) No later than one hundred eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of title 5, United States Code. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c)(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b).

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b).

(d) The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 3 or 5 of this Act.

APPENDIX B
Legislative History of the Administrative Exhaustion Provision of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e, Pub. L. No. 96-247 § 7, 94 Stat. 349, 352-353 (1980)

This Appendix sets out each of the official sources of the legislative history of the Civil Rights of Institutionalized Persons Act. All known references to CRIPA's administrative exhaustion provision within that history are noted.

The 94th Congress

House bill: H.R. 12008, 94th Cong (1976) (sec. 4 is an exhaustion provision) (introduced by Rep. Railsback on the proposal of Attorney General Edward Levi); see 122 Cong. Rec. 3925 (1976) (statement of Rep. Railsback). After referral to the Judiciary Committee, no further action was taken.

The 95th Congress

House bills: H.R. 2439, 95th Cong. (1977) (no exhaustion provision); H.R. 5791, 95th Cong. (1977) (sec. 4 is an exhaustion provision); H.R. 9400, 95th Cong. (1977) (sec. 5 is about exhaustion).

Senate bills: S. 1393, 95th Cong. (1977) (no exhaustion provision).

House Hearings: *Civil Rights for Institutionalized Persons: Hearing on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary,* 95th Cong. (Apr. 29, May 11, 13, 18 & 23, 1977).

See especially *id.* at 20-23, 33-34, 322-325 (oral and written testimony, and supplemental materials of Drew S. Days III, Assistant Att'y Gen., Civil Rights Division, U.S. Dep't of Justice); *id.* at 43, 47, 54, 58, 366 (oral and written testimony, and supplemental materials of Charles R. Halpern, Member,

Am. Bar Ass'n Comm'n on the Mentally Disabled); *id.* at 48-53 (written testimony of Hon. Sylvia Bacon, Member, Am. Bar Ass'n Comm'n on Correctional Facilities and Services); *id.* at 57-58 (oral testimony of Melvin T. Axilbund, Staff Dir., Am. Bar Ass'n Comm'n on Correctional Facilities and Services); *id.* at 69-70, 77-78 (oral and written testimony of Jay Lawrence Lichtman, Deputy Dir., Defender Division, Nat'l Legal Aid and Defender Ass'n); *id.* at 90 (written statement of C. Raymond Marvin, Washington Counsel, Nat'l Ass'n of Attorneys Gen., provided in support of the testimony of Hon. John D. Ashcroft, Att'y Gen., State of Missouri); *id.* at 98 (letter from Scott McAlister, Assistant Att'y Gen., State of Oregon, provided in support of General Ashcroft's testimony); *id.* at 101, 111 (oral testimony of Hon. John D. Ashcroft, Att'y Gen., State of Missouri); *id.* at 108 (questioning by Rep. Railsback); *id.* at 117, 122-123, 328 (oral and written testimony, and supplemental materials of Alvin Bronstein, Executive Dir., Nat'l Prison Project, Am. Civil Liberties Union); *id.* at 147-148 (exchange between Mr. Bronstein and Rep. Railsback); *id.* at 155-157 (exhange between Mr. Bronstein and several committee members); *id.* at 164-165 (oral testimony of Prof. Abram Chayes, Harvard Law School); *id.* at 169, 173-174 (exchanges between Prof. Chayes and members of the committee); *id.* at 227-237 (oral and written testimony of Hon. Ruggero J. Aldisert, Judge, U.S. Court of Appeals for the Third Circuit); *id.* at 238, 441 (oral testimony and supplemental materials of Stanley C. Van Ness, Comm'r, Dep't of the Public Advocate, State of New Jersey); *id.* at 253-254, 259, 271-272 (written and oral testimony of Stephen P. Berzon, Legal Dir., Children's Defense Fund); *id.* at 263-264, 267, 439 (oral and written testimony of Michael S. Lottman, Dir., Education Law Center, Newark, N.J.); *id.* at 274, 276, 280-281, 282 (oral and written testimony of Edward C. King and Toby Sambol Edelman, Staff Attorneys, Nat'l Senior Citizens Law Center); *id.* at 479 (letter from Laurence Gilbert, Supervising Att'y, Research Office, Legal Aid and Defender Ass'n of Detroit); *id.* at 492-495

(1977) (letter from William D. Leeke, Comm'r, South Carolina Dep't of Corrections, and President, Am. Correctional Ass'n); *id.* at 513-514 (letter from Prof. Richard Singer, Rutgers Law School); *id.* at 516 (letter from Kenneth M. Streit, Wisconsin Ass'n for Retarded Citizens, Inc.); *id.* at 517 (letter from William B. Spann, Jr., President, Am. Bar Ass'n); *id.* at 519 (statement of Nat'l Ass'n for Retarded Citizens); *id.* at 520 (letter from Linden Thorn, Executive Dir., Florida Ass'n for Retarded Children); *id.* at 520 (letter from Hon. Timothy E. Wirth, Member, U.S. House of Representatives); *id.* at 529 (letter from John L. Hill, Att'y Gen., State of Texas); *id.* at 533 (letter from V. Frank Mendicino, Att'y Gen., State of Wyoming); *id.* at 615-757 (Appendix 7—Materials on Correctional Grievance Procedures); *id.* at 856-857 (letter from Prof. Frank Remington, U. Wisc. Law School).

Senate Hearings: *Civil Rights of Institutionalized Persons: Hearing on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong. (June 17, 22, 23, 30, & July 1, 1977).
See especially *id.* at 13, 34-35 (oral and written testimony of Hon. Drew S. Days III., Assistant Att'y Gen., Civil Rights Division, U.S. Dep't of Justice); *id.* at 111 (written testimony of David S. Garcia, Staff Worker, Mental Health Advocacy Project, Los Angeles; Former Patient, Metro. State Hosp.); *id.* at 187, 189-190 (written testimony of Charles R. Halpern, on behalf of the Am. Bar Ass'n); *id.* at 193, 197 (oral and written testimony of Dr. Philip Roos, Executive Dir., Nat'l Ass'n for Retarded Citizens); *id.* at 209-210, 214 (oral and written testimony of Prof. Ivan Bodensteiner, Valparaiso University); *id.* at 412, 413, 415-417 (oral and written testimony of William D. Leeke, Comm'r, South Carolina Dep't of Corrections and President, Am. Correctional Ass'n) (oral testimony presented by Anthony P. Travisono on behalf of Comm'r Leeke); *id.* at 420, 437-438 (oral and written testimony of Irving R. Segal, Am. Bar Ass'n Comm'n on Correctional Facilities and Services); *id.* at 439-443 (Am. Bar Ass'n Comm'n on Correc-

tional Facilities and Services and Comm'n on the Mentally Disabled, Report to the Am. Bar Ass'n House of Delegates, submitted as exhibit to statement of Irving R. Segal); *id.* at 464, 468 (oral and written testimony of Morton Posner, Executive Dir., Federation of Parents Organizations for the N.Y. State Mental Institutions); *id.* at 556 (written statement of V. Frank Mendicino, Att'y Gen., State of Wyoming); *id.* at 569-571 (statement of the Prisoner Assistance Project of the Baltimore Legal Aid Bureau, Inc.); *id.* at 617 (written testimony of Robert B. Hansen, Att'y Gen., State of Utah); *id.* at 638, 642 (oral and written testimony of Alvin J. Bronstein, Executive Dir., Nat'l Prison Project, Am. Civil Liberties Union); *id.* at 772, 779 (oral and written testimony of William G. Nagel, Executive Vice President, The Am. Foundation, Inc., Institute of Corrections, Philadelphia, PA); *id.* at 791-792, 796-797 (oral and written testimony of Stephen P. Berzon, Legal Dir., Children's Defense Fund); *id.* at 902, 909 (oral and written testimony of Edward C. King and Toby Sambol Edelman, Attorneys, Nat'l Senior Citizens Law Center, Washington, D.C.).

House Reports:
H.R. Rep. No. 95-1058 (1978) (reporting H.R. 9400 from the Judiciary Committee).
See especially *id.* at 28-30, 33.

Senate Reports:
S. Rep. No. 95-1056 (1978) (reporting S. 1393 from the Judiciary Committee).
See especially *id.* at 37.

House Floor Debates:
May 1, 1978: 124 Cong. Rec. 11,974-11,990. See especially *id.* at 11976 (statement of Rep. Kastenmeier); *id.* at 11982 (exchange between Rep. Railsback and Rep. Sawyer).
May 25, 1978: 124 Cong. Rec. 15,441-15,447. See especially *id.* at 15,441 (reprinted letter from Att'y Gen. Griffin Bell to

Rep. Peter W. Rodino, Chairman, House Comm. on the Judiciary, submitted as part of statement of Rep. Kastenmeier).
July 28, 1978: 124 Cong. Rec. 23,175-23,188. See especially *id.* at 23,179-23,182 (exchange involving many members of Congress).

The 96th Congress
House bills:
Civil Rights of Institutionalized Persons Act, H.R. 10, 96th Cong. (1979) (sec. 4 is about exhaustion).

Senate bills:
S. 10, 96th Cong. (1979) (sec. 5 is about exhaustion).

House hearings:
Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong. (Feb. 14 & 15, 1979).
See especially *id.* at 3 (statement of Rep. Kastenmeier); *id.* at 4 (written statement of Rep. Railsback); *id.* at 9, 13 (oral and written testimony of Hon. Drew S. Days III, Asst. Att'y Gen., Civil Rights Div.); *id.* at 23-26 (exchange among Rep. Kastenmeier, Rep. Sawyer, General Days); *id.* at 32-33 (exchange between Rep. Gudger and General Days); *id.* at 48-49 (testimony of Peggy Weisenberg, Staff Att'y, Am. Civil Liberties Union Nat'l Prison Project); *id.* at 340-341 (letter from John H. Lashly, Chairman, Am. Bar Ass'n); *id.* at 349 (letter from Elaine R. Jones and Charles Stephen Ralston, NAACP Legal Def. and Educ. Fund, Inc.); *id.* at 354 (letter from Junius W. Williams, President, Nat'l Bar Ass'n); *id.* at 386-388, 394-399 (passages from William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 633-635, 641-646 (1979)).

Senate hearings:
Civil Rights of the Institutionalized: Hearings on S. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 96th Cong. (Feb. 9, March 28 & 29, 1979).
No discussion of exhaustion.

House reports:
H.R. Rep. No. 96-80 (1979) (reporting H.R. 10 to the House from the Judiciary Committee).
See especially *id.* at 3, 4, 22-25; *id.* at 26 (letter from Alice Rivlin, Dir., Cong. Budget Office); *id.* at 28 (supplemental views of Rep. Volkmer); *id.* at 29 (supplemental views of Rep. Sensenbrenner); *id.* at 30 (dissenting views of Rep. Kindness).

Senate reports:
S. Rep. No. 96-416 (1979), *reprinted in* 1980 U.S.C.C.A.N. 787 (reporting S. 10 from the Judiciary Committee).
See especially *id.* at 34, 35, 42.

Conference report:
H.R. Conf. Rep. No. 96-897 (1980), *reprinted in part in* 1980 U.S.C.C.A.N. 832.
See especially *id.* at 9, 15-17.

House floor debate:
May 16, 1979: 125 Cong. Rec. 11,459-11,461.
May 23, 1979: 125 Cong. Rec. 12,489-12,508. See especially *id.* at 12,490 (statement of Rep. Harris); *id.* at 12,491-12,492 (statement of Rep. Drinan); *id.* at 12493 (statement of Rep. Kastenmeier); *id.* at 12,494 (statements of Rep. Rodino and Rep. McClory); *id.* at 12,496 (statement of Rep. Butler); *id.* at 12497 (statement of Rep. Fish and exchange between Rep. Volkmer and Rep. Kastenmeier); *id.* at 12,498 (statement of Rep. Sawyer); *id.* at 12,503 (statement of Rep. Gudger).
May 12, 1980: 126 Cong. Rec. 10,780-10,783. See especially *id.* at 10,780 (statement of Rep. Kastenmeier).

Senate floor debate:
May 24, 1979: 126 Cong. Rec. 12,816-12,820.
Feb. 26, 1980: 126 Cong. Rec. 3710-3748.
See especially *id.* at 3716 (statement of Sen. Hatch); *id.* at 3720-3721 (statement of Sen. Cranston); *id.* at 3736 (statement of Sen. Cochran).
Feb. 27, 1980: 126 Cong. Rec. 3936-4001, 4020. See especially *id.* at 3970 (statement of Sen. Bayh).
Feb. 28, 1980: 126 Cong. Rec. 4177, 4180-4195.
Apr. 23, 1980: 126 Cong. Rec. 8767-8768.
Apr. 24, 1980: 126 Cong. Rec. 8929-8961.
Apr. 25, 1980: 126 Cong. Rec. 9147.
Apr. 28, 1980: 126 Cong. Rec. 9175-9176.
Apr. 30, 1980: 126 Cong. Rec. 9394-9403.
May 1, 1980: 126 Cong. Rec. 9578-9604.
May 6, 1980: 126 Cong. Rec 9980-10,007. See especially *id.* at 10,004, 10,005 (statement of Sen. Hatch).

Signing Statement:
Statement on Signing H.R. 10 Into Law (May 23, 1980), Public Papers of the Presidents, Jimmy Carter, Vol. 1, pp. 965-966 (1981).

Appendix C: Descriptions of the Amici Curiae

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation was established in 1972 to protect and promote the civil and constitutional rights of prisoners. The **American Civil Liberties Union of Northern California** is a regional affiliate of the ACLU.

The **Legal Aid Society of the City of New York** is a private organization that has provided free legal assistance to indigent persons in New York City for nearly 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of their constitutional and statutory rights. The Society advocates on behalf of prisoners in New York City jails and New York state prisons, and conducts litigation on prison conditions.

Established in 1997, the **Ohio Justice & Policy Center** (formerly Prison Reform Advocacy Center) is a public interest, nonprofit law firm that litigates to enforce constitutional standards regarding prisoners' medical care, safety and other conditions of confinement and advises prisoners on how to exhaust administrative remedies. The Ohio Justice & Policy Center has also worked to educate the Sixth Circuit Court of Appeals about the various prison grievance systems that exist in the states of the Sixth Circuit.

For over 25 years the **Prison Law Office**, a nonprofit public interest law firm, has been in the forefront of legal efforts to enforce the Constitution and other laws inside the walls of California's prisons. Located just outside the gates of San Quentin, the Prison Law Office represents individual prisoners, engages in class action and other impact litigation, educates the public about prison conditions, and provides technical assistance to attorneys throughout the country.

Prisoners' Legal Services of New York (PLS) is a non-profit state-wide organization that provides legal representation to indigent prisoners in an effort to protect and promote their civil and human rights. Founded in 1976 in response to 1971's devastating Attica riot, PLS receives more than 8000 requests for assistance annually and represents hundreds of inmates every year. The McKay Commission determined that two major reasons for the Attica riot were inadequate redress of grievances and lack of access of prisoners to the courts. Thus PLS is keenly interested in ensuring that meritorious claims by prisoners are heard by the courts and not dismissed due to a prisoner's inability to comply with arbitrary state-imposed grievance deadlines.

The **Uptown People's Law Center** ("UPLC") is a non-profit legal service center serving poor and working people of Chicago. In addition to its legal work for community residents, UPLC represents prisoners in challenges to prison conditions, the parole system, and a variety of other matters. UPLC has litigated exhaustion issues in a wide variety of prison cases from the inception of the PLRA to the present, and receives hundreds of letters yearly from prisoners seeking advice on what steps they must take to properly exhaust administrative remedies.

Supreme Court, U.S.
FILED
FEB 2 - 2006
OFFICE OF THE CLERK

No. 05-416

In The
Supreme Court of the United States

JEANNE S. WOODFORD, WARDEN, A.P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION OF THE YALE LAW SCHOOL AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

GIOVANNA SHAY
JEROME N. FRANK LEGAL SERVICES ORGANIZATION
YALE LAW SCHOOL
P.O. Box 209090
New Haven, CT 06520-9090
203-432-4800

Counsel of Record for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	4
I. A procedural default rule would significantly restrict the enforcement of civil rights statutes in prisons, jails, and juvenile facilities	6
A. Correctional grievance procedures nationwide are marked by successive short deadlines	6
B. A procedural default rule would discourage reporting of institutional problems, would eliminate remedies for meritorious claims, and would be difficult to administer	13
C. The most vulnerable inmates will be least able to comply with procedural deadlines and rules	16
II. Exhaustion under CRIPA as amended by the PLRA cannot be analogized to habeas exhaustion or administrative appeals	22
A. This Court should not engraft a habeas-style procedural default rule onto the civil rights statutes	22
B. A civil rights action under Section 1983 is not analogous to judicial review of federal agency decisions	26
CONCLUSION	28

TABLE OF AUTHORITIES

Page

CASES

Alexander S. v. Boyd, 113 F.3d 1373 (4th Cir. 1997) 12

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 26

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 27

Cleavinger v. Saxner, 474 U.S. 193 (1985) 27

Coleman v. Thompson, 501 U.S. 722 (1991) 14

Dickinson v. Zurko, 527 U.S. 150 (1999) 27

Doe v. Cook County Juvenile Detention Center, 1999 WL 1069244 (N.D. Ill. Nov. 22, 1999) 13

Edwards v. Carpenter, 529 U.S. 446 (2000) 23

Ford v. Georgia, 498 U.S. 411 (1991) 16

Garcia v. Village of Mount Prospect, 360 F.3d 630 (7th Cir. 2004) 26

Giano v. Goord, 380 F.3d 670 (2d Cir. 2004) 4

Hope v. Pelzer, 536 U.S. 730 (2002) 25

James v. Kentucky, 466 U.S. 341 (1984) 16

Johnson v. California, 125 S.Ct. 1141 (2005) 26

Lawrence v. Goord, 304 F.3d 198 (2d Cir. 2002) 15

Lee v. Kemna, 534 U.S. 362 (2002) 16

Martin v. Hadix, 527 U.S. 343 (1999) 12

Minix v. Pazera, 2005 WL 1799538 (N.D. Ind. July 27, 2005) ..... *passim*

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 5

TABLE OF AUTHORITIES – Continued

Page

Monell v. Dept. of Soc. Services City of N.Y., 436 U.S. 658 (1978) 4

Monroe v. Pape, 365 U.S. 167 (1961) 4, 24

Moore v. Louisiana Dept. of Public Safety and Corrections, 2002 WL 1791996 (E.D. La. Aug. 5, 2002) 13

Muhammad v. Close, 540 U.S. 749 (2004) 25

Patsy v. Board of Regents, 457 U.S. 496 (1982) 5

Porter v. Nussle, 534 U.S. 516 (2002) 2, 14, 15

Preiser v. Rodriguez, 411 U.S. 475 (1973) 25

Strong v. David, 297 F.3d 646 (7th Cir. 2002) 15

Thomas v. Woolum, 337 F.3d 720 (6th Cir. 2003) 2

Turner v. Safley, 482 U.S. 78 (1987) 25

Wainwright v. Sykes, 433 U.S. 72 (1977) 23

Wilkinson v. Dotson, 125 S.Ct. 1242 (2005) 25

Wilson v. Garcia, 471 U.S. 261 (1985) 14

STATUTES

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1997e(d) (2005) 21

Administrative Procedure Act (APA), 5 U.S.C. § 556 (2005), *et seq.* 4, 27

Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d)(1) (2005) 23

TABLE OF AUTHORITIES – Continued

Page

Civil Rights of Institutionalized Persons Act (CRIPA), as amended by the PLRA, 42 U.S.C. § 1997e(a) 1, 4, 5, 26

Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504 (a)(15), 110 Stat. 1321, 1355 (1996) 21

Utah Code Ann. § 63-46b-1(2)(c) (2005) 27

Texas Code Ann. § 2001.226 (2005) 27

RULES

Sup. Ct. R. 37(3) 1

Sup. Ct. R. 37(6) 1

REGULATIONS AND POLICIES

Alaska Dept. of Corrections Policy Index No. 808.03, effective May 23, 2002 ..... 7, 9, 11

Arizona Dept. of Corrections Dept. Order 800, effective Mar. 3, 2000 ..... 7, 8, 9

Arkansas Dept. of Corrections Admin. Dir. 04-01, effective Feb. 1, 2004 ..... 7, 9, 12

California Dept. of Corrections, tit. 15, Calif. Code of Reg. § 3084.2(b) (2004) 7

Clark County Sheriff's Office, Inmate Handbook, *available at* http://www.co.clark.wa.us/sheriff/custody/handbook.pdf (last visited Jan. 24, 2006) 12

Colorado Dept. of Corrections, Reg. No. 850-04, effective Dec. 15, 2005 11

TABLE OF AUTHORITIES – Continued

Page

Connecticut Dept. of Correction, Admin. Dir. 9.6, effective Mar. 5, 2003 ..... 7, 9, 10, 11

Delaware Bureau of Prisons Proc. No. 4.4, revised May 15, 1998 ..... 7, 8, 10, 11

District of Columbia Dept. of Corrections, D.O. 4030.1D, effective May 4, 1992 ..... 7, 9, 10, 11

Rules of the Florida Dept. of Corrections, Ch. 33-103, effective Oct. 9, 2005 7

Georgia Dept. of Corrections Standard Operating Procedures (SOP) IIB05-0001, effective June 1, 2004 ..... 7, 8, 10, 12

Glenn County Jail Handbook, *available at* http://www.countyofglenn.net/Jail (last visited Jan. 24, 2006) 12

Hawaii Dept. of Corrections, Policy No. 493.12.03, effective Apr. 3, 1992 ..... 7, 10, 11

Idaho Dept. of Corrections Dir. No. 316.02.01.001, revised Sept. 16, 2004 ..... 7, 10

Illinois Dept. of Corrections, 20 Ill. Adm. Code § 504.810 (2005) 8

Indiana Dept. of Correction, Policy No. 00-02-301, effective May 1, 2000 ..... *passim*

Iowa Dept. of Corrections, Policy No. IN-V-46, revised Jan. 2005 8

Kansas Dept. of Corrections, Article 15 – Grievance Procedure for Inmates, § 44-15-101 ..... 8, 11

Kansas Dept. of Corrections, Article 15 – Grievance Procedure for Inmates, § 44-15-102 10

TABLE OF AUTHORITIES – Continued

Page

Kentucky Dept. of Corrections Policy No. 14.6, effective Jan. 4, 2005 ..... 7, 10, 11

Louisiana, La. Admin. Code, tit. 22 pt. I, § 325 ..... 10, 11

Maine Dept. of Corrections, Policy and Procedures Manual subsection 29.1 ..... 8, 10

Maryland Dept. of Public Safety and Correctional Services (Division of Correction), Directive No. 185-101, effective Apr. 1, 1993 10

Maryland Dept. of Public Safety and Correctional Services (Division of Pretrial Detention and Services), Dir. No. 180-1, issued Nov. 30, 2000 11

Massachusetts Dept. of Correction, 103 CMR 491.00, effective Jan. 5, 2001 ..... 7, 10

Michigan Dept. of Corrections Policy No. 03.02.130 effective Dec. 19, 2003 ..... 2, 7, 8, 10, 12

Minnesota Dept. of Corrections Policy No. 303.100, effective May 1, 2005 8

Missouri Dept. of Corrections Institutional Services Policy and Procedure Manual, Procedure No. IS8-2.1, effective Jan. 15, 1992 ..... 7, 8, 10, 12

Montana State Prison Policy No. 3.3.3, effective Apr. 1, 1997 ..... 7, 9, 10, 11

Nebraska Dept. of Correctional Services, Policy No. 217.02, referencing Nebraska Admin. Code, tit. 68, ch. 2, § 003.02 ..... 8, 9, 10

Nevada Dept. of Corrections Admin. Reg. 740.02, effective Jan. 5, 2004 ..... 7, 8, 10, 11

New Hampshire Dept. of Corrections, Statement No. 1.16, effective Oct. 1, 2002 8

TABLE OF AUTHORITIES – Continued

Page

New Jersey Dept. of Corrections IMM.RRP.003, revised Aug. 1, 2003 10

New Mexico Corrections Dept., CD-150500, revised June 22, 2005..... 9

New Mexico Corrections Dept., CD-150501, revised June 22, 2005..... 8, 10

New York Dept. of Correctional Services, N.Y. Comp. Codes R. & Regs., tit. 7, § 701.7 (2005)..... 10, 11

North Carolina Department of Juvenile Justice and Delinquency Prevention Policy No. YD/DC 8.0 13

North Carolina Dept. of Corrections, Rules and Policies Inmate Booklet (Mar. 2002)..... 8

North Dakota Dept. of Corrections Policies and Procedures Manual, effective May 5, 2005.....8, 9, 10, 11

Ohio Admin. Code § 5120-9-31..... 8

Oklahoma Dept. of Corrections, OP-090124, effective Oct. 11, 2005..... 8, 9

Oregon Admin. Rules 291-109-0100 *et seq.*..... 8

Pennsylvania Dept. of Corrections, Policy No. DC-ADM 804, effective Jan. 3, 2005..... 10

Rhode Island Code of Reg. 06.070.002, effective Jan. 7, 1980 .....2, 7, 10, 11

South Carolina Dept. of Corrections Policy No. GA-01.12, issued Nov. 1, 2004 ..... 8, 10, 12

South Dakota Dept. of Corrections Policy No. 1.3.E.2, effective Aug. 3, 2005 ..... 7, 8, 10

Tennessee Dept. of Corrections Index No. 501.01, effective May 1, 2004..... 7, 10, 12

TABLE OF AUTHORITIES – Continued

Page

Texas Dept. of Criminal Justice, Offender Orientation Handbook (Nov. 2004) 8

United States Bureau of Prisons Directive 1330.13, effective Aug. 13, 2002 ..... 7, 22

Utah Dept. of Corrections Institutional Operations Division Manual, FDr02/03.03, dated July 1, 2003 ....*passim*

Virginia Dept. of Corrections Procedure No. DOP 866, Nov. 20, 1998 ..... 8, 11, 12

Washington Dept. of Corrections, No. DOC 550.100, effective Mar. 1, 2005 8

West Virginia Division of Corrections, W.Va. Code of State Rules § 90-9-3 ..... 11, 12

Wisconsin Dept. of Corrections, Wisconsin Admin. Code § DOC 310.09 *et seq.* (2005) 11

Wyoming Dept. of Corrections, Admin. Reg. No. 2.501, revised Dec. 11, 1998 ..... 8, 9, 11

REPORTS AND FINDINGS

ALLEN J. BECK AND LAURA M. MARUSCHAK, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH TREATMENT IN STATE PRISONS (2001) 21

PAULA M. DITTON, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS (1999) 21

CAROLINE WOLF HARLOW, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS (Jan. 2003) 20

TABLE OF AUTHORITIES – Continued

Page

Letter Of Bradley J. Schlozman, Acting Assistant Attorney General, to Mitch Daniels, now Governor of the State of Indiana (Sept. 9, 2005), *available at* http://www.usdoj.gov/crt/split/documents/split_indiana_southbend_juv_findlet_9-9-05.pdf (last visited Jan. 24, 2006) 3, 19

U.S. DEPT. OF EDUCATION OFFICE OF EDUCATION AND RESEARCH, LITERACY BEHIND PRISON WALLS: PROFILES OF THE ADULT PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY (1994) 20

AMERICAN PSYCHIATRIC ASSOCIATION, PSYCHIATRIC SERVICES IN JAILS AND PRISONS (2d ed. 2000) 21

INTEREST OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION OF THE YALE LAW SCHOOL AS AMICUS CURIAE

At the Jerome N. Frank Legal Services Organization of the Yale Law School (LSO), law students supervised by law school clinical faculty provide free representation to indigent people in need of legal aid.[1] Since 1970, LSO students have provided legal assistance to incarcerated people, first through a Prison Clinic, and now through both the Prison Clinic and the Complex Federal Litigation Clinic (CFL). Yale students have represented inmates in federal and state courts and before administrative agencies, in a range of proceedings including habeas and civil rights actions, and involving a wide variety of issues. In recent years, LSO has litigated a number of cases involving Prison Litigation Reform Act (PLRA) exhaustion. This case will determine the viability of at least one current LSO client's case, and it will affect the remedies available to many other inmates seeking help from LSO.

SUMMARY OF THE ARGUMENT

The government urges this Court to engraft a judicially created procedural default rule onto the exhaustion requirement of the Civil Rights of Institutionalized Persons

[1] The parties have consented to the filing of this amicus brief and consent letters have been filed with the Clerk. Sup. Ct. R. 37(3). Pursuant to Supreme Court Rule 37(6), amicus states that no counsel for any party authored any part of this brief. No person or entity other than the Jerome N. Frank Legal Services Organization of the Yale Law School (LSO) made any monetary contribution to the preparation or submission of this brief.

Act (CRIPA), as amended by the PLRA, 42 U.S.C. § 1997e(a). The government's gloss is not required by the statute and is inconsistent with the structure and purpose of 42 U.S.C. § 1983 and the other civil rights statutes. The simple exhaustion requirement that Congress mandated in § 1997e(a) is intended to provide, as this Court has stated, "time and opportunity [for corrections officials] to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Congress did not intend to require federal courts to stand idle in the face of constitutional violations because an inmate missed a grievance deadline. *See Thomas v. Woolum*, 337 F.3d 720, 733 (6th Cir. 2003).

A procedural default rule will severely impair federal courts' ability to remedy constitutional abuses in prisons, because correctional grievance procedures are marked by numerous levels of review and short deadlines, inviting procedural errors by unrepresented inmates. Amicus LSO has surveyed correctional policies nationwide, and the Appendix to this brief includes a chart describing grievance policies promulgated by the United States Bureau of Prisons, state correctional systems, and jails. Many of these policies include numerous levels of review, with deadlines as short as two to five days.[2]

---

[2] *See, e.g.*, Indiana Dept. of Correction, Policy No. 00-02-301(XVIII)(A) and (C) (May 1, 2000) (allowing forty-eight hours for informal complaint and an additional two working days for the filing of a formal grievance); Michigan Dept. of Corrections Policy No. 03.02.130(R) and (X) (Dec. 19, 2003) (requiring attempt at informal resolution within two business days, followed by the filing of a grievance within five business days); Rhode Island Code of Reg. 06.070.002 (10) (Jan. 7, 1980) (requiring grievances to be filed within three days).

Grafting a procedural default rule onto the civil rights statutes will exact the greatest toll on the most vulnerable inmates and detainees. Under such a regime, the least sophisticated inmates and those most in danger or most easily intimidated will suffer disproportionately: juveniles, first-time offenders, the mentally ill, victims of sexual assault who do not immediately come forward, the illiterate or marginally literate, those who do not speak English, and those who fear retaliation or further abuse by line staff.

In *Minix v. Pazera*, 2005 WL 1799538 at *1 (N.D. Ind. July 27, 2005), a district court dismissed on summary judgment claims arising from repeated beatings and a sexual assault that a child had suffered in an Indiana juvenile facility. The court based its decision on the child's failure to comply with the Indiana grievance process, which includes a two-business-day filing deadline, despite what the court termed the juvenile's mother's "heroic" attempts to alert state officials to the abuse. *Id.* at *2, 4, 7. Less than two months after the district court issued its decision in *Minix*, the United States Department of Justice (DOJ) Civil Rights Division found that the Indiana juvenile facility at issue in *Minix* had violated children's constitutional rights by failing to protect them from harm, and that its "dysfunctional" grievance system had contributed to the unconstitutional conditions.[3] *Minix* confirms that a procedural default rule will result in dismissal of

[3] Letter of Bradley J. Schlozman, Acting Assistant Attorney General, to Mitch Daniels, now Governor of the State of Indiana 2, 3, and 7 (Sept. 9, 2005), *available at* http://www.usdoj.gov/crt/split/documents/split_indiana_southbend_juv_findlet_9-9-05.pdf (last visited Jan. 24, 2006).

meritorious constitutional claims, and accord undue deference to grievance systems that lie wholly within the control of the defendants.

Both Petitioner and the United States claim that the federal-state comity concerns animating the habeas procedural default rule also apply to PLRA exhaustion, Brief of Petitioner, *Woodford v. Ngo* (No. 05-416) (Pet. Br.) at 28-30; Brief of the United States, *Woodford v. Ngo* (No. 05-416) (U.S. Br.) at 13-15, and the United States argues that rules governing judicial review of federal agencies' decisions should govern civil rights actions, U.S. Br. at 10-12. However, neither federal habeas review of state court criminal convictions nor judicial review of agency decisions presents a true analogy for exhaustion in the context of federal civil rights actions. Civil rights suits are original actions, designed to vindicate federal rights when state and local officials are unable or unwilling to do so. *See Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds*, *Monell v. Dept. of Soc. Services*, 436 U.S. 658 (1978). The minimal process provided by many inmate grievance systems cannot be compared with state court criminal proceedings, or agency actions under the Administrative Procedure Act (APA), *see* 5 U.S.C. § 556 (2005), *et seq*. *See Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004).

ARGUMENT

Neither the text nor the legislative history of CRIPA as amended by the PLRA requires a procedural default rule. The amicus brief filed by a number of states acknowledges candidly that, "[t]he language of § 1997e(a) does not specifically address the issue." Brief of the State

of New York *et al.* as Amici Curiae at 2, *Woodford v. Ngo* (No. 05-416) (N.Y. Br.). Another amicus brief filed in support of Respondent examines the legislative history of CRIPA as amended by the PLRA, and demonstrates that Congress did not intend to adopt a procedural default rule. Brief of A.C.L.U. National Prison Project as Amicus Curiae, *Woodford v. Ngo* (No. 05-416). This Court has been rightly reluctant to invent exhaustion rules for civil rights litigation without explicit Congressional guidance. *See Patsy v. Board of Regents*, 457 U.S. 496, 508 (1982) ("A judicially imposed exhaustion requirement would be inconsistent with Congress' decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself."); *Mohasco Corp. v. Silver*, 447 U.S. 807, 816 n.19 (1980) ("[W]e do not believe that a court should read in a time limitation provision that Congress has not seen fit to include . . . at least when dealing with a statutory scheme in which laymen, unassisted by trained lawyers[,] initiate the process.") (internal citations and quotation marks omitted).

Recognizing the absence of a Congressional mandate for a procedural default rule, the government relies on policy arguments about the need for timely investigations of inmates' complaints, N.Y. Br. at 3, and analogizes to other areas of the law, such as habeas and administrative law, Pet. Br. at 26-30, U.S. Br. at 10-15. These arguments provide slim justification for a draconian rule that would allow jailers to determine whether federal courts can review constitutional claims, eviscerating the civil rights statutes and depriving the most vulnerable inmates of access to a federal forum.

I. A PROCEDURAL DEFAULT RULE WOULD SIGNIFICANTLY RESTRICT THE ENFORCEMENT OF CIVIL RIGHTS STATUTES IN PRISONS, JAILS, AND JUVENILE FACILITIES.

A. Correctional grievance procedures nation-wide are marked by successive short deadlines.

A procedural default rule would drastically impair federal courts' ability to remedy many types of constitutional violations. Inmate grievance procedures are characterized by numerous levels of review, each with its own deadline. Many of these deadlines are quite short. The government states that "[m]ost jurisdictions require the filing of administrative claims within 14 to 30 days of the action being challenged." U.S. Br. at 29. This is not the whole story. To better understand the nature of inmate grievance procedures, amicus LSO has compiled a collection of state and local jurisdictions' grievance procedures.[4] The chart in the Appendix to this brief summarizes our findings.

More than a dozen of the department of corrections policies summarized in the chart provide for periods shorter than fourteen days for the filing of the first official

---

[4] Amicus compiled these policies by searching electronic databases and the internet and by canvassing attorneys and advocates. Because inmate grievance policies sometimes are not published in a readily available form, and because in some jurisdictions they are revised frequently, the policies set out in the chart should be considered illustrative only. Amicus does not represent that they are the most current. The second column of the chart states the source of information on which we relied in preparing the chart, including an effective date (when available). The policies and other materials that we relied on in compiling the chart are available on our web site at http://www.law.yale.edu/Woodford.

grievance – between two and ten days counted in some jurisdictions from the date of the incident and in others from the response to an informal complaint.[5] More than thirty of the departments of corrections that we surveyed require a prisoner to at least attempt informal resolution – talking with a staff member or submitting a request form – before filing a grievance.[6] Some of these policies set

---

[5] *See* Arizona Dept. of Corrections Dept. Order 802.09, 1.1.2 (Mar. 3, 2000) (ten days); Arkansas Dept. of Corrections Admin. Dir. 04-01(IV)(E)(7) (Feb. 1, 2004) (three working days); Georgia Dept. of Corrections Standard Operating Procedures (SOP) IIB05-0001(VI)(C)(2) (June 1, 2004) (five business days); Indiana Dept. of Corrections Policy No. 00-02-301 XVIII (C) (May 1, 2000) (two working days); Kentucky Dept. of Corrections Policy No. 14.6 II (J)(2) (Jan. 4, 2005) (five working days); Massachusetts Dept. of Correction, 103 CMR 491.08(4) (Jan. 5, 2001) (ten working days); Michigan Dept. of Corrections Policy 03.02.130 (X) (Dec. 19, 2003) (five business days); Missouri Dept. of Corrections Institutional Services Policy and Procedure Manual, Procedure No. IS8-2.1 III(I)(3) (Jan. 15, 1992) (five working days); Montana State Prison Policy No. 3.3.3 V (F)(1) (Apr. 1, 1997) (three working days); Nevada Dept. of Corrections Admin. Reg. 740.02, § 1.5.1 (Jan. 5, 2004) (five days); Rhode Island Code of Regulations 06.070.002(E)(10) (Jan. 7, 1980) (three days); South Dakota Dept. of Corrections, Policy No. 1.3.E.2, Formal Resolution (A) (Aug. 3, 2005) (five working days); Tennessee Dept. of Corrections Index No. 501.01 VI (C)(1) (May 1, 2004) (seven calendar days); Utah Dept. of Corrections Institutional Operations Division Manual, FDr02/03.03(C) (July 1, 2003) (five working days).

[6] *See* United States Bureau of Prisons Directive 1330.13, § 542.13 (Aug. 13, 2002); Alaska Dept. of Corrections Policy Index No. 808.03 (B)(1) (May 23, 2002); Arizona Dept. of Corrections Dept. Order 802.01, 1.1.3 (Mar. 3, 2000); Arkansas Admin. Dir. 04-01 (IV)(E)(1) (Feb. 1, 2004); California Dept. of Corrections, tit. 15, Calif. Code of Reg. § 3084.2(b) (2004); Connecticut Dept. of Correction, Admin. Dir. 9.6 (9) (Mar. 5, 2003); Delaware Bureau of Prisons Proc. No. 4.4 at 5 (May 15, 1998); District of Columbia Dept. of Corrections D.O. 4030.1D VII (F)(1) (May 4, 1992); Rules of the Florida Dept. of Corrections, Ch. 33-103.005(1) (Oct. 9, 2005); Georgia Dept. of Corrections, SOP Ref. No. IIB05-0001 VI(B)(1) (June 1, 2004); Hawaii Dept. of Corrections, Policy No. 493.12.03(4.0)(10)(b) (Apr. 3, 1992); Idaho Dept. of Corrections Dir.

(Continued on following page)

out deadlines for initiating the informal resolution process that are quite short – as short as two days. *See, e.g.*, Indiana Dept. of Correction, Policy No. 00-02-301 XVIII (A) (May 1, 2000) (forty-eight hours); Michigan Dept. of Corrections Policy No. 03.02.130 (R) (Dec. 19, 2003) (two business days).[7] A number of policies require a prisoner

---

No. 316.02.01.001, 05.02.01 (Sept. 16, 2004); Illinois Dept. of Corrections, 20 Ill. Adm. Code § 504.810(a) (2005); Indiana Dept. of Corrections, Policy No. 001-02-301, XIV (May 1, 2000); Iowa Dept. of Corrections, Policy No. IN-V-46 V(A) (Jan. 2005); Kansas Dept. of Corrections, Article 15 – Grievance Procedure for Inmates, § 44-15-101(b); Maine Dept. of Corrections, Policy and Procedures Manual subsection 29.1 VI(B)(1); Michigan Dept. of Corrections Policy No. 03.02.130(x) (Dec. 19, 2003); Minnesota Dept. of Corrections Policy No. 303.100(A)(1)(a)(2) (May 1, 2005); Missouri Dept. of Corrections, Institutional Services Policy and Procedure Manual Procedure No. IS 8-2.1 III(H)(1) (Jan. 15, 1992); Montana State Prison Policy No. 3.3.3 V(E) (Apr. 1, 1997); Nebraska Dept. of Correctional Services, Policy No. 217.02, referencing Nebraska Admin. Code, tit. 68, ch. 2, § 003.02; Nevada Dept. of Corrections, Admin. Reg. 740, § 1.4.1.1 (Jan. 5, 2004); New Hampshire Dept. of Corrections, Statement No. 1.16 IV (A)(1) (Oct. 1, 2002); New Mexico Corrections Dept., CD-150501(A)(1) (June 22, 2005); North Carolina Dept. of Corrections, Rules and Policies Inmate Booklet, § 20(6)(a) (Mar. 2002); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights, VI(H)(1) (May 5, 2005); Ohio Admin. Code § 5120-9(J)(1)-31; Oklahoma Dept. of Corrections, OP-090124 IV(A) (Oct. 11, 2005); Oregon Admin. Rules 291-109-0140(1)(a); South Carolina Dept. of Corrections Policy No. GA-01.12 (13.1) (Nov. 1, 2004); South Dakota Dept. of Corrections, Policy No. 1.3.E.2, Informal Resolution (Aug. 3, 2005); Texas Dept. of Criminal Justice, Offender Orientation Handbook VI(B) (Nov. 2004); Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.03(A) (July 1, 2003); Virginia Dept. of Corrections Procedure No. DOP 866-7.13 (Nov. 20, 1998); Washington Dept. of Corrections, No. DOC 550.100 (Mar. 1, 2005); Wyoming Dept. of Corrections, Admin. Reg. No. 2.501, Appendix A (C)(1)(a) (Dec. 11, 1998).

[7] *See also* Arizona Dept. of Corrections, Dept. Order 802.08 (Mar. 3, 2000) (ten working days); Delaware Bureau of Prisons, Proc. No. 4.4 (May 15, 1998) (seven calendar days); Georgia Dept. of Corrections, SOP Ref. No. IIB05-0001 (VI)(B)(5) (June 1, 2004) (ten calendar days);

(Continued on following page)

to attempt informal resolution *within* the time for filing the first official grievance. *See, e.g.*, Connecticut Dept. of Correction, Admin. Dir. 9.6 (9) (Mar. 5, 2003); District of Columbia Dept. of Corrections, D.O. 4030.1D VII (F)(1) and (3) (May 4, 1992). Some policies allow prison officials a number of days in which to respond to the informal complaint before the prisoner may go on to file the formal one. *See, e.g.*, Connecticut Dept. of Correction, Admin. Dir. 9.6 (9), (10)(G) (Mar. 5, 2003) (requiring informal resolution and permitting staff fifteen days to respond to informal request, but requiring that formal grievance be filed within thirty days of incident).

All of the department of corrections policies that we reviewed required an inmate to pursue at least one level of review of the initial response to a formal grievance in order to complete administrative exhaustion. Many mandate two or more levels of review. Of the corrections department policies that we collected, a significant number required an administrative appeal in fewer than fourteen days; deadlines were as short as three to five days in many instances.[5] The Alaska and Indiana policies

---

Montana State Prison Policy No. MSP 3.3.3 V (E)(1) (Apr. 1, 1997) (five working days); Nebraska Department of Correctional Services, Policy No. 217.02, referencing Nebraska Admin. Code, tit. 68, ch. 2, § 004.01 (three calendar days); New Mexico Corrections Dept., CD-150500 (June 22, 2005) (five calendar days); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights VI (H) (May 5, 2005) (five calendar days); Oklahoma Dept. of Corrections, OP-090124 IV(A) and (B) (Oct. 11, 2005) (three days for attempt at verbal resolution, seven days for written attempt at resolution); Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.03 (July 1, 2003) (seven working days); Wyoming Dept. of Corrections, Admin. Reg. No. 2.501, Appendix A(C)(1) (Dec. 11, 1998) (seven calendar days).

[5] *See* Alaska Dept. of Corrections, Index No. 808.03 (B)(4) (May 23, 2002) (two working days); Arizona Dept. of Corrections, Dept. Order 802.09, 1.3 (Mar. 3, 2000) (ten calendar days); Arkansas Dept. of

(Continued on following page)

Corrections, Admin. Dir. 04-01 IV (G) (Feb. 1, 2004) (five working days); Colorado Dept. of Corrections, Reg. No. 850-04 IV (D)(1)(c) (Dec. 15, 2005) (five calendar days); Connecticut Dept. of Correction, Admin. Dir. 9.6(16) (Mar. 5, 2003) (five calendar days); Delaware Bureau of Prisons, Pro. No. 4.4, IGP Resolution Levels: Appeals (May 15, 1998) (three days); District of Columbia Dept. of Corrections, D.O. 4030.1D VII(G)(3) (May 4, 1992) (five days); Georgia Dept. of Corrections, SOP II B05-0001 (VI)(D)(2)(1) (June 1, 2004) (five business days); Hawaii Dept. of Public Safety, Policy No. 493.12.03, 4.15 (a) and (f) (Apr. 3, 1992) (five days); Idaho Dept. of Correction, Dir. No. 316.02.01.001, 05.03.00 (Sept. 16, 2004) (ten days); Indiana Dept. of Correction, Policy No. 00-02-301 XVIII (C) (May 1, 2000) (two business days); Kansas Dept. of Corrections, Article 15 – Grievance Procedure for Inmates, § 44-15-102(b) and (c)(1) (three days); Kentucky Dept. of Corrections, Policy No. 14.6 II (J)(2)(j) and (3)(c) (Jan. 4, 2005) (three working days); Louisiana, La. Admin. Code, tit. 22 pt. I, § 325(G)(2)(a) (five days); Maine Dept. of Corrections, Policy and Procedures Manual subsection 29.1IV(D)(1) and (E)(1) (ten days); Maryland Dept. of Public Safety and Correctional Services (Division of Correction), Directive No. 185-101 III(G)(1) (Apr. 1, 1993) (ten calendar days); Massachusetts Dept. of Correction 103 CMR 491.12(1) (Jan. 5, 2001) (ten working days); Michigan Dept. of Corrections Policy Directive No. 03.02.130 (DD) and (HH) (Dec. 19, 2003) (five business days and ten business days); Missouri Dept. of Corrections Institutional Services Policy and Procedure Manual III(K) (January 15, 1992) (five working days and ten working days); Montana State Prison Policies and Procedures, Policy No. 3.3.3 V(I)(1)(a) (Apr. 1, 1997) (three working days); Nebraska Department of Correctional Services, Policy No. 217.02, referencing Nebraska Admin. Code, tit. 68, ch. 2, § 004.05 (ten days); Nevada Dept. of Corrections, Admin. Reg. 740.02, 1.3.4 (Jan. 5, 2004) (five days); New Jersey Dept. of Corrections IMM.RRP.003 IV(H) (Aug. 1, 2003) (ten working days); New Mexico Corrections Dept., CD-150501(D)(1) (June 22, 2005) (seven days); New York State Dept. of Correctional Services, N.Y. Comp. Codes R. & Regs., tit. 7, § 701.7(b)(1) (2005) (four working days); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights, VI (I)(3)(a) (May 5, 2005) (five days); Pennsylvania Dept. of Corrections, Policy No. DC-ADM 804 VI(C)(1)(b) (Jan. 3, 2005) (ten working days); Rhode Island Code of Rules 06 070 002 (C)(1), (D)(1), and (E)(2) (Jan. 7, 1980) (three working days); South Carolina Dept. of Corrections Policy No. GA-01.12(13.5) (Nov. 1, 2004) (five calendar days); South Dakota Dept. of Corrections, Policy No. 1.3.E.2, Appeals to the Secretary of Corrections (B) (Aug. 3, 2005) (10 days). Tennessee Dept. of Corrections, Index No. 501.01 VI

(Continued on following page)

that we reviewed allow only two working days for certain appeals.[9] The Delaware and Kansas policies that we obtained permit three calendar days for appeals.[10] Several departments of corrections permit only three working days for certain appeals.[11] The New York State Department of Correctional Services policy permits only four working days for appeals. N.Y. Comp. Codes R. & Regs., tit. 7, § 701.7 (2005). Ten of the policies that we collected (including the policy of the Connecticut Department of Correction) allow five calendar days to appeal.[12] An additional six

---

(C)(2) and (3) (May 1, 2004) (five days); Utah Dept. of Corrections, Policy Manual, FDr02/03.031(C) (July 1, 2003) (five working days); Virginia Dept. of Corrections, Pro. No. DOP 866-7.16(5) (Nov. 20, 1998) (five days); West Virginia Division of Corrections, W.Va. Code of State Rules § 90-9-3.1.10, 3.2.1 (five working days); Wisconsin Dept. of Corrections, Wisconsin Admin. Code § DOC 310.13(1) (2005) (ten days); Wyoming Dept. of Corrections, Admin. Reg. No. 2.501, Appendix A(G)(2) (Dec. 11, 1998) (ten days).

[9] Alaska Dept. of Corrections Index No. 808.03 (B)(4) (May 23, 2002); Indiana Dept. of Correction, Policy No. 00-02-301 XVIII (E), (G), and (I) (May 1, 2000).

[10] Delaware Bureau of Prisons Policy, No. 4.4, IGP Resolution Levels: Appeals (May 15, 1998); Kansas Dept. of Corrections, Art. 15, Policy No. 44-15-102 (c)(1).

[11] Kentucky Dept. of Corrections Policy No. 14.6 II (J)(2)(j) and (3)(c) (Jan. 4, 2005); Maryland Dept. of Public Safety and Correctional Services (Division of Pretrial Detention and Services), Dir. No. 180-1 V (C)(1) (Nov. 30, 2000); Montana State Prison Policy No. 3.3.3 V(I)(1)(a) and (K)(1) (Apr. 1, 1997); Rhode Island Dept. of Corrections, R.I. Code R. 06.070.002 (C)(1), (D)(1), and (E)(2) (Jan. 7, 1980).

[12] *See* Colorado Dept. of Corrections Admin. Reg. 850-04 IV (D)(1)(c) (Dec. 15, 2005); Connecticut Dept. of Correction, Admin. Dir. 9.6 (16) (Mar. 5, 2003); District of Columbia Dept. of Corrections, D.O. 4030.1D VII (G)(3) and (4) (Apr. 4, 1992); Hawaii Dept. of Public Safety, Policy No. 493.12.03(15)(a)(F) (Apr. 3, 1992); Louisiana, La. Admin. Code, tit. 22, pt. I, § 325(G)(2)(a); Nevada Dept. of Corrections, Admin. Reg. 740.02, § 1.6.1 (Jan. 5, 2004); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights, VI (I)(2)(a) and (3)(a)

(Continued on following page)

state corrections policies permit five working days to appeal.[13]

The PLRA applies not only to state corrections agencies, but also to local jails and detention centers. As a practical matter, the smaller and more local the facility, the more difficult it is to obtain a copy of its grievance policy. However, we have included in our chart two county sheriffs' policies covering jails, and the deadlines in these policies are also quite short. The policy in the Glenn County (California) Jail provides five working days for the formal grievance and five working days for the appeal.[14] The Clark County (Washington) Sheriff's Office permits seven calendar days for the grievance and forty-eight hours for the appeal.[15]

Case law to date concludes that PLRA exhaustion requirements apply to juvenile facilities,[16] which sometimes

---

(May 5, 2005); South Carolina Dept. of Corrections, Policy No. GA-01.12(13.5) (Nov. 1, 2004); Tennessee Dept. of Corrections, Index No. 501.01 VI (C)(2) and (3) (May 1, 2004); Virginia Dept. of Corrections, Proc. No. DOP 866-7.16(5) (Nov. 20, 1998).

[13] *See* Arkansas Dept. of Correction, Admin. Dir. 04-01 IV (G) (Feb. 1, 2004); Georgia Dept. of Corrections, SOP Ref. No. IIB05-0001 VI (D)(2) (June 1, 2004); Michigan Dept. of Corrections, No. 03.02.130 (DD) (Dec. 19, 2003); Missouri Dept. of Corrections Institutional Services Policy and Procedure Manual, Procedure No. IS8-2.1 III(K) (Jan. 15, 1992); Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.04(B) (July 1, 2003); and West Virginia Division of Corrections, W. Va. Code St. R. § 90-9-3 (2005).

[14] *See* Glenn County Jail Handbook, *available at* http://www.countyofglenn.net/Jail (last visited Jan. 24, 2006).

[15] *See* Clark County Sheriff's Office, Inmate Handbook, *available at* http://www.co.clark.wa.us/sheriff/custody/handbook.pdf (last visited Jan. 24, 2006).

[16] *See Alexander S. v. Boyd*, 113 F.3d 1373, 1385 (4th Cir. 1997), *abrogated on other grounds, Martin v. Hadix*, 527 U.S. 343 (1999);

(Continued on following page)

provide as few as one to two days for filing grievances. *See, e.g.*, North Carolina Department of Juvenile Justice and Delinquency Prevention Policy No. YD/DC 8.0 (providing that grievances must be appealed to Facility Director within twenty-four hours); *Minix v. Pazera*, 2005 WL 1799538 at *3-4 (N.D. Ind. July 27, 2005) (discussing two-business-day deadline in Indiana juvenile facility).

B. A procedural default rule would discourage reporting of institutional problems, would eliminate remedies for meritorious claims, and would be difficult to administer.

A number of states have filed an amicus brief arguing that grievance deadlines are "essential to the operation of prison grievance procedures" because they "facilitate prompt investigation and resolution of grievances, allow for swift remedial responses, and ensure that prison officials receive timely information about prisoner complaints before inmate dissatisfaction leads to unrest." N.Y. Br. at 3. While prompt complaints are preferable, there are reasons why an inmate might legitimately delay filing a grievance: fear of retaliation, injury, or, particularly in the case of sexual assault victims, trauma or embarrassment. A procedural default rule would discourage inmates from filing complaints if the deadline has passed. By contrast, a simple exhaustion rule encourages inmates to report problems, and allows prison officials to determine whether they will seek to remedy them, or decline to do so on the

---

Minix v. Pazera, 2005 WL 1799538 (N.D. Ind. July 27, 2005); *Moore v. Louisiana Dept. of Public Safety and Corrections*, 2002 WL 1791996 (E.D. La. Aug. 5, 2002); *Doe v. Cook County Juvenile Detention Center*, 1999 WL 1069244 (N.D. Ill. Nov. 22, 1999).

grounds that the information is too stale. The statutes of limitations on civil rights actions ensure that federal officials will not be haled into court to answer ancient claims. *See Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (concluding that § 1983 actions must be brought within state statutes of limitations for tort actions based on personal injuries).

In some situations, it would defy belief that prison officials would not want to learn about serious problems – for example a beating or sexual assault – even if it were brought to their attention after the deadline for filing a grievance. Indeed, this is another way in which prison grievance deadlines differ from state court procedural rules. State court rules and the habeas doctrine of procedural default are designed to ensure finality and to end second-guessing of state court judgments; they are essentially retrospective. *See Coleman v. Thompson*, 501 U.S. 722, 747 (1991). By contrast, prison grievance procedures, at least in part, function as a management tool: they bring issues to the attention of prison officials who are responsible for remedying constitutional violations on an on-going basis. *See* N.Y. Br. at 1, 3; *Porter*, 534 U.S. at 525. A procedural default rule would change the nature of prison grievance systems, transforming their deadlines into "safe harbor" provisions for rights abusers, and reducing the incentive for prison officials to remedy rights violations after the passage of the grievance deadline.

Maintaining a simple exhaustion rule does not mean, as the government claims, that inmates will be allowed to let prison grievance deadlines lapse and proceed directly to federal court. *See* Pet. Br. at 15; N.Y. Br. at 10. A mechanism already exists to force exhaustion: dismissal without prejudice. A court confronted with a prisoner's unexhausted claim

should dismiss it, to allow the prisoner to attempt to exhaust his tardy claim before returning to federal court. *See, e.g., Lawrence v. Goord*, 304 F.3d 198, 199-200 (2d Cir. 2002) (reinstating judgment of district court dismissing inmate's claim without prejudice to refiling after exhaustion). If the grievance deadline for a dismissed claim has passed, prison and jail authorities have a choice: they may choose to avail themselves of the opportunity to address the prisoner's claim and potentially forestall litigation. Alternatively, officials can choose to enforce their filing deadline, and, after the prisoner attempts to exhaust, he can return to federal court, having satisfied the purposes of the exhaustion requirement, to provide "time and opportunity . . . to address complaints internally" before suit, *Porter*, 534 U.S. at 525.

The government has framed the question presented in this case as encompassing not only alleged procedural defaults based on late complaints, but also other types of procedural defects. This raises the specter of requiring *pro se* inmates to file what is in effect a draft § 1983 complaint, with no opportunity to correct mistakes that they learn of later, within only a few days or weeks of an incident – an event that may have left the inmate physically injured or incapacitated, fearful of retaliation, or confined to a segregation unit with even less access to legal advice and information than is usually available in the institution. *See, e.g., Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002) ("[G]rievances must contain the sort of information that the administrative system requires. Some states (Illinois is an example) require fact-pleading in litigation, and these might be expected to require factual detail in administrative grievances too.").

A procedural default rule based on grievance policies also would be difficult to administer because prison and jail grievance policies are much more malleable and informal than the state court rules of criminal procedure that are scrutinized in the habeas procedural default cases. *Cf. Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (Georgia Supreme Court's retroactive application of a rule that barred consideration of a *Batson* claim did not constitute "firmly established and regularly followed state practice" that could constitute adequate and independent state ground for decision); *James v. Kentucky*, 466 U.S. 341, 346-49 (1984) (Kentucky's distinction between "admonitions" and "instructions" was not "the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights"). Grievance policies are not always published, and sometimes must be requested directly from the defendants. Nor is there as well-developed a body of decisional law interpreting prison grievance systems as there is construing state rules of criminal procedure. *See Lee v. Kemna*, 534 U.S. 362, 387 (2002) (declining to apply procedural default rule when no published Missouri decision directed "unmodified application" of state rules governing requests for continuances). As a result, a procedural default rule would be difficult to apply, and would hand correctional officials the power to terminate civil rights challenges.

C. The most vulnerable inmates will be least able to comply with procedural deadlines and rules.

The most vulnerable inmates would be the most affected by a strict procedural default rule. Unlike judicial review of an agency determination, or federal habeas review of a

state court criminal conviction, the genesis of a civil rights action is a constitutional violation, not a prior legal proceeding. A prisoner who has been abused may fear or mistrust prison authorities, or simply believe that a grievance will not help. In the days or weeks after a serious incident, a prisoner may be injured, withdrawn, or frightened.

Some of the inmates subject to the PLRA are children.[17] In *Minix v. Pazera*, 2005 WL 1799538 (N.D. Ind. July 27, 2005), a district court in the Northern District of Indiana granted summary judgment to the defendants in a civil rights case brought by a young man, S.Z., and his mother, Cathy Minix, for injuries that he suffered while in custody at Indiana juvenile facilities, including South Bend Juvenile Facility.[18] *Id.* at *7. The *Minix* court based its decision on S.Z.'s failure to properly exhaust Indiana grievance procedures, which allow only two business days in which to file a grievance. *Id.* at *3.

While S.Z. was incarcerated in Indiana state juvenile facilities in 2002 and 2003, he was "jumped and beaten" repeatedly by other inmates, sustaining injuries including bruising, a black eye, a bloody nose, and a split lip. *Id.* at *1-2. No staff took action to investigate or protect him. *Id.* at *1. During one of these beatings, S.Z. suffered a "seizure-like" reaction; although staff were called to help him,

---

[17] Courts have applied the PLRA exhaustion requirement to juvenile facilities. *See supra*, n.16.

[18] The *Minix* court granted defendants' motion for partial summary judgment, dismissed the federal claims without prejudice, and remanded the case to St. Joseph Superior Court "where an Indiana court may address claims brought under Indiana law against Indiana employees." *Id.* at *7.

no efforts were made to protect him, and he was beaten again the next day. *Id.* One of these beatings occurred in a day room which was monitored by four cameras. *Id.* at *2. At one point in his incarceration, S.Z. was raped, and he also saw another detainee being raped. *Id.* Presumably affected by these events, S.Z. was placed on suicide watch and sometimes did not eat. *Id.* at *1. In January 2003, S.Z. was beaten with padlock-laden socks. *Id.* at *2. This time, the staff gave him medical care and took pictures of his injuries. *Id.* Because he did not want to be viewed as a "snitch," S.Z. did not report these beatings. *Id.* Staff at the facility allegedly encouraged such beatings and arranged for juveniles to fight, sometimes even handcuffing a juvenile so that others could beat him. *Id.*

S.Z.'s mother, however, was aware of his injuries and made what the district court describes as "heroic efforts" to protect her son. *Id.* at *2, 7. Before S.Z. was beaten with padlocks, his mother told staff at the facility about the bruises on his body and the threats that had been made against him. *Id.* at *2. After the padlock beating, she wrote to an Indiana state Magistrate Judge and a Juvenile Judge, one of whom notified the Governor about her concerns. *Id.* In March 2003, Mrs. Minix attempted to attend a prearranged meeting with the Superintendent of one of the facilities, but was prevented from doing so by staff. *Id.* at *2, 4. She was never given any information about filing a grievance. *Id.* at *2. She contacted the Deputy Department of Correction (DOC) Commissioner, and, ultimately, the Governor. *Id.* at *4. Finally, in May 2003, S.Z. was "unexpectedly released on order from the Governor's office." *Id.* at *2.

Despite Mrs. Minix's repeated attempts to notify state authorities of the abuse of her son, the district court

concluded in a written opinion dated July 27, 2005, that S.Z.'s failure to comply with the Indiana grievance process, which includes a two-business-day deadline, meant that S.Z. could not proceed with his federal claims. *Id.* at *2-7. The court said that Mrs. Minix's attempts to alert state officials to the abuse of her son were insufficient, in part because they "did not issue within anything near the prescribed time." *Id.* at *4. The court wrote, "her communications didn't comply with the general time constraints built into the grievance process, which allow investigation and corrective action while evidence and memories are still available." *Id.*

In September 2005, less than two months after the district court's decision in S.Z.'s case, the Civil Rights Division of the Department of Justice (DOJ) reported the results of an investigation that it had conducted into juvenile facilities in Indiana, including the South Bend Juvenile Correctional Facility, one of the facilities where S.Z. was assaulted. The DOJ concluded that, "certain deficiencies at South Bend violate the constitutional and federal statutory rights of the youth residents," and that "South Bend fails to adequately protect the juveniles in its care from harm."[19] It also concluded that, "[th]e dysfunctional grievance system at South Bend contributes to the State's failure to ensure a reasonably safe environment."[20]

---

[19] Letter of Bradley J. Schlozman, Acting Assistant Attorney General, to Mitch Daniels, now Governor of the State of Indiana 2, 3 (Sept. 9, 2005), *available at* http://www.usdoj.gov/crt/split/documents/split_indiana_southbend_juv_findlet_9-9-05.pdf (last visited Jan. 24, 2006).

[20] *Id.* at 7.

Minix illustrates the situation that will confront juveniles under a strict procedural default regime. Children subject to unconstitutional abuse will not be able to seek protection or redress in federal court because of their inability to challenge their abusers within the few days or weeks allowed by the grievance system. Although an executive agency ultimately investigated the facility at issue in *Minix*, the individual plaintiff in that case did not get relief in a timely fashion. Moreover, the DOJ does not possess sufficient resources to investigate every facility where constitutional abuses are alleged.

Many adult inmates also will have trouble complying with short grievance deadlines. One of the greatest obstacles to compliance is illiteracy or poor literacy. Not surprisingly, incarcerated people report lower levels of educational attainment than the general population: forty percent of state prison inmates, twenty-seven percent of federal inmates, and forty-seven percent of inmates in local jails have failed to complete high school or its equivalent, compared with only about eighteen percent of the general population. CAROLINE WOLF HARLOW, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS 2 (Jan. 2003). The National Adult Literacy Survey (NALS), conducted in 1992 by the United States Department of Education, concluded that the vast majority of inmates – seven out of ten – operate at the lowest two levels of literacy on a five-level scale. U.S. DEPT. OF EDUCATION OFFICE OF EDUCATION AND RESEARCH, LITERACY BEHIND PRISON WALLS: PROFILES OF THE ADULT PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY xviii (1994). Some inmates performing at the lowest level "do not demonstrate the ability to perform even . . . fairly straightforward literacy tasks," such as

finding a single fact in a short piece of text or entering personal information on a form. *Id.* at 17. A procedural default rule will sweep many of these persons out of court for failing to conform to procedures they are incapable of understanding and following correctly.

Further, a significant percentage of inmates suffer from mental illness: Bureau of Justice Statistics (BJS) surveys report that sixteen percent of state prison inmates, seven percent of federal inmates, and sixteen percent of those in local jails "reported either a mental condition or an overnight stay in a mental hospital." PAULA M. DITTON, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 1 (1999). Some estimates are even higher. *See* AMERICAN PSYCHIATRIC ASSOCIATION, PSYCHIATRIC SERVICES IN JAILS AND PRISONS xix (2d ed. 2000) (estimating that about twenty percent of inmates in prisons and jails have serious mental illnesses and that up to five percent are actively psychotic). Another BJS report states that one in ten inmates takes psychotropic medications, with the figure increasing to nearly one in five in certain states. ALLEN J. BECK AND LAURA M. MARUSCHAK, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH TREATMENT IN STATE PRISONS 1, 4 (2001). By the time a family member or advocate discovers that a mentally ill person has been abused, it may be too late to file a grievance.

Most likely a prisoner in this situation will not have ready access to legal advice. Few indigent inmates have lawyers on retainer to advise them in civil matters,[21] and

[21] Particularly in the wake of the PLRA fee caps, 42 U.S.C. § 1997e(d) (2005), and restrictions on Legal Services Corporation (LSC) funding, Omnibus Consolidated Rescissions and Appropriations Act of

(Continued on following page)

their access to legal advice and information in prison within the stringent time limits of prison grievance procedures generally will be limited.[22] This is especially true for prisoners seeking to challenge abusive conduct by jail or prison staff, because such inmates may be injured, intimidated or fearful, or confined to a segregation unit. Thus, even if a prisoner has a meritorious claim – even if a court will later appoint counsel for the prisoner – the prisoner may not be represented during the time for filing a grievance.

II. EXHAUSTION UNDER CRIPA AS AMENDED BY THE PLRA CANNOT BE ANALOGIZED TO HABEAS EXHAUSTION OR ADMINISTRATIVE APPEALS.

A. This Court should not engraft a habeas-style procedural default rule onto the civil rights statutes.

Petitioner argues that, "[b]ecause the policy considerations underlying federal-habeas exhaustion are analogous to those underlying PLRA exhaustion, both the rationale for and utility of a procedural-default mechanism in federal habeas apply under the PLRA." Pet. Br. at 12. In

---

1996, Pub. L. No. 104-134, § 504 (a)(15), 110 Stat. 1321, 1355 (1996), many jurisdictions have few law offices and legal services organizations willing and able to take inmates' cases, let alone ones that are well-versed in how to develop them.

[22] Even if the prisoner has a civil rights attorney, he may be required to navigate the prison grievance proceeding *pro se*; many grievance proceedings do not allow lawyers to file grievances on behalf of their clients. *See, e.g.*, United States Bureau of Prisons, Directive 1330.13, § 540.16 (Aug. 13, 2002) (noting that, although an inmate may obtain assistance from outside sources, including attorneys, "no person may submit a Request or Appeal on the inmate's behalf," and seeking outside assistance will not justify a filing delay).

fact, the federal-state comity issues in habeas corpus and prisoners' civil rights claims are quite different. Law professors have submitted an amicus brief in support of Respondent explaining that the habeas procedural default rule is a creature of the adequate and independent state ground doctrine, designed to force the primary litigation of criminal defendants' constitutional claims in state courts. Brief of Law Professors as Amicus Curiae in Support of Respondent, *Woodford v. Ngo* (No. 05-416).

As this Court has said, habeas procedural default rules are designed to make "the state trial on the merits the 'main event' . . . rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). This Court has extended the concept of "procedural default" in the habeas context to later stages of the state court criminal process, including direct appeal and state post-conviction proceedings, thereby ensuring the primacy of the entire state court criminal system. *See, e.g., Edwards v. Carpenter*, 529 U.S. 446, 452-54 (2000).[23] Indeed, after the Anti-Terrorism and Effective Death Penalty Act (AEDPA), federal habeas courts are required to accord considerable deference to state courts' determination of federal constitutional claims, granting relief only if the state-court adjudication was "contrary to, or an unreasonable application of, clearly established Federal law, as

---

[23] Petitioner cites language from *Edwards* in support of the notion that exhaustion and procedural default are not analytically distinct. Pet. Br. at 27-28. The *Edwards* Court's reference to the "inseparability of the exhaustion rule and the procedural-default doctrine," however, only describes the importance of procedural default in the habeas context; it does not conflate the two concepts. 529 U.S. 446, 452-53.

determined by the Supreme Court." 28 U.S.C. § 2254(d)(1) (2005).

These comity concerns are simply inapplicable to civil rights suits under § 1983. The civil rights and habeas statutes strike a different balance between federal and state authority. 42 U.S.C. § 1983 was enacted specifically to enable federal courts to vindicate federal civil rights when state and local officials were unable or unwilling to do so. Describing the debates preceding passage of § 1983 in 1871, this Court wrote in *Monroe v. Pape*: "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies." 365 U.S. at 180.

Moreover, prison and jail grievance systems are in no way the "main event" in civil rights litigation in the sense that state court criminal proceedings, with their constitutionally mandated protections, are the focus of federal post-conviction litigation. Grievance proceedings primarily serve a correctional management, not a "rights-protection" purpose. Inmate grievance proceedings are not conducted by judges, and they are not accompanied by significant procedural protections. Often, no evidence is taken, and no legal argument considered. Indeed, amicus is aware of no situation in recent years in which a prison system has afforded an LSO clinic client even an administrative hearing in response to a grievance. No one would argue, for example, that a federal court should defer to a prison grievance officer's determination of federal law. When a federal court hears a § 1983 action, it does not deferentially review

the prison grievance proceeding; it hears the claim *de novo*, perhaps after a full trial, with such evidentiary illumination as the administrative record may provide.

The government cites *Preiser v. Rodriguez*, 411 U.S. 475 (1973), for the proposition that the same comity concerns that underlie habeas rules also restrain federal courts' review of state prison officials' actions in a civil rights case. U.S. Br. at 15; *see* Pet. Br. at 29. The actual holding of *Preiser* is that actions implicating good time credits challenge custody, "the core of habeas corpus," and thus must be brought in habeas so that they are subject to state court exhaustion. *Preiser*, 411 U.S. at 491-92. Since *Preiser*, this Court has reaffirmed repeatedly that the comity concerns underlying its holding apply only where the fact or duration of custody is at issue, and that habeas exhaustion principles extend no further than those cases. *See Wilkinson v. Dotson*, 125 S. Ct. 1242, 1247-48 (2005); *Muhammad v. Close*, 540 U.S. 749, 754-55 (2004).

Petitioner also attempts to equate the deference that federal courts accord prison officials in matters of prison administration under *Turner v. Safley*, 482 U.S. 78 (1987), with the federal-state comity concerns underlying habeas procedural default rules. Pet. Br. at 29-30. However, the *Turner* standard does not require federal courts to defer to prison rules limiting courts' ability to hear constitutional claims. *Turner* recognizes that "courts must take cognizance of the valid constitutional claims of prison inmates," and that, "when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id.* at 84. *See, e.g., Hope v. Pelzer*, 536 U.S. 730 (2002). Indeed, with respect to certain types of constitutional claims, federal courts will abandon *Turner* deference for strict

scrutiny. *Johnson v. California*, 125 S. Ct. 1141, 1147-49 (2005). In the absence of a clear Congressional mandate, this Court cannot allow prison and jail officials' procedural rules to limit federal courts' ability to discharge their duty.

B. A civil rights action under Section 1983 is not analogous to judicial review of federal agency decisions.

The United States argues that procedural default is required by a "general rule of administrative procedure." U.S. Br. at 10. In support of this argument, however, the government relies on cases involving federal judicial review of federal agencies' decisions, which stand for the proposition that courts should not consider arguments that were not first presented to the agency. *Id.* at 10-11. This principle cannot be transplanted to prison and jail grievance procedures preceding the filing of a civil rights action.

Exhaustion under CRIPA as amended by the PLRA is in no way analogous to the scheme of federal administrative law, which involves a unified system of statutes, regulations, and agency procedures, with the overall purpose of ensuring that agency procedure is implemented correctly and consistently. In civil rights actions, federal courts do not "review" the decisions reached in prison grievance proceedings in the way that they review the decisions of administrative law judges and agencies. An action under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is an original action in which discovery may be conducted and evidence taken; it is not limited by the administrative record of the prison grievance proceeding. *See Garcia v. Village of Mount Prospect*, 360 F.3d 630, 643-44

(7th Cir. 2004) ("Title VII and §§ 1981 and 1983 claims are original actions independent of the administrative review proceeding and are therefore plenary in scope.").

Certainly, the government could not argue that a federal district court should defer to a prison or jail grievance system's interpretation of a statute governing correctional officers' behavior. *Contrast Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). Nor would a federal district court defer to a prison grievance officer's findings of fact regarding an inmate's constitutional claim of excessive force or inadequate medical care. *Contrast Dickinson v. Zurko*, 527 U.S. 150, 160-63 (1999) (discussing the appropriate standard of review for courts to apply to findings of fact made by the Patent and Trademark Office).

As this Court has recognized, the administrative procedures accorded inmates by their jailers often include "few of the procedural safeguards contained in the Administrative Procedure Act [APA]." *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985) (recognizing that disciplinary proceedings provided no right to a lawyer, compulsory process, confrontation of witnesses, or discovery, among other safeguards). In the experience of amicus, exhaustion of grievance procedures – even in the federal system – often consists of little more than a prisoner filling out a form, which is sometimes returned with a response written at the bottom. The Indiana grievance policy reviewed by amicus states candidly that, "[t]he grievance policy is not a legal forum." *See* Indiana Department of Correction, Policy No. 00-02-301 XIV (May 1, 2000). In fact, some states specifically exempt correctional agencies from their state administrative procedure acts. *See, e.g.*, Utah Code Ann. § 63-46b-1(2)(c) (2005); Texas Code Ann. § 2001.226 (2005).

This case will in large part determine the continued viability of § 1983 and other civil rights statutes as vehicles for federal courts to review the treatment of inmates. This Court should not accede to the government's request that it engraft a judicially-imposed procedural default rule onto the civil rights statutes, but should instead require what Congress intended and policy considerations mandate – simple exhaustion.

CONCLUSION

For all of the foregoing reasons, amicus Jerome N. Frank Legal Services Organization (LSO) urges this Court to affirm the judgment of the Ninth Circuit.

Respectfully submitted,

GIOVANNA SHAY
Counsel of Record for Amicus
JEROME N. FRANK LEGAL SERVICES ORGANIZATION
YALE LAW SCHOOL
P.O. Box 209090
New Haven, CT 06520-9090
203-432-4800 (phone)
203-432-1426 (fax)
giovanna.shay@yale.edu

Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
United States Bureau of Prisons	Directive 1330.13 Effective 8/13/02	Yes	20 days	20 days	30 days	N/A
Alabama[2]						
Alaska Department of Corrections	Index No. 808.03 Effective 5/23/02	Yes	30 days	2 days*	30 days	N/A
Arizona Department of Corrections	Department Order 800 Effective 3/3/00	Yes 10 days*	10 days†	10 days	10 days	N/A
Arkansas Department of Corrections	Admin. Directive 04-01 Effective 2/1/04	Yes 15 days	3 days*†	5 days*	N/A	N/A
California Department of Corrections	Title 15 California Code of Regulations §§ 3084.2(b), 3084.5, 3084.6(c) (2004)	Yes	15 days*[3]	15 days*	15 days*	N/A
Glenn County, California Division of the Sheriff	Glenn County Jail Handbook § II	No	5 days*[4]	5 days*	N/A	N/A
Colorado Department of Corrections	Regulation No. 850-04 Effective 12/15/05	No‡	30 days	5 days	5 days	N/A
Connecticut Department of Correction[5]	Admin. Directive 9.6 Effective 3/5/03	Yes	30 days[6]	5 days	5 days[7]	N/A
Delaware Bureau of Prisons	Procedure No. 4.4 Revised 5/15/98	Yes[8] 7 days	Automatic[9]	3 days[10]	N/A	N/A
District of Columbia Department of Corrections	D.O. 4030.1D Effective 5/4/92	Yes	15 days	5 days	5 days	N/A
Florida Dept. of Corrections	Chapter 33-103 of the Rules of the Dept. of Corrections Effective 10/9/05	Yes[11]	15 days*†[12]	15 days	N/A	N/A

App. 1

* indicates working or business days. Otherwise, "days" are calendar days.

† indicates that first formal grievance deadline is measured from the response to an informal resolution attempt. Otherwise, days for filing the first official grievance are counted from the day of the incident.

‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
Georgia Department of Corrections	Standard Operating Procedures Ref. No. IIB05-0001 Effective 6/1/04	Yes 10 days	5 days*†	5 days*	N/A	N/A
Hawaii Department of Public Safety	Policy No. 493.12.03 Effective 4/3/92	Yes	14 days	5 days	5 days	N/A
Idaho Department of Correction	Directive No. 316.02.01.001 Revised 9/16/04	Yes	15 days	10 days	N/A	N/A
Illinois Department of Corrections	20 Ill. Admin. Code §§ 504.810, 504.850	Yes	60 days	30 days	N/A	N/A
Indiana Department of Correction	Admin. Procedure No. 00-02-301 Effective 5/1/00	Yes 48 hours	2 days*†	2 days*	2 days*	2 days*
Iowa Department of Corrections	Policy No. IN-V-46 Revised January 2005	Yes	30 days	15 days	15 days	N/A
Kansas Department of Corrections	44-15-101 14-15-102	Yes	15 days*[13]	3 days	N/A	N/A
Kentucky Department of Corrections	Policy No. 14.6 Effective 1/4/05	No[14]	5 days*	3 days*	3 days*	N/A
Louisiana Department of Public Safety and Corrections	La. Admin. Code, tit 22, pt. I, § 325	No‡	90 days[15]	5 days	N/A	N/A
Maine Department of Corrections	Policy and Procedures Manual Subsection 29.1	Yes	15 days	10 days	10 days	N/A
Maryland Department of Public Safety and Correctional Services	Directive No. 185-001 Effective 2/1/01 Code of Maryland Regulations 12.07.01.01 *et seq.*	No‡	15 days	10 days	30 days[16]	N/A
Maryland Department of Public Safety and Correctional Services, Division of Pretrial Detention and Services[17]	Directive No. 180-1 Issued 11/30/00	No	30 days	Not specified[18]	3 days*	3 days*

* indicates working or business days. Otherwise, "days" are calendar days.

† indicates that first formal grievance deadline is measured from the response to an informal resolution attempt. Otherwise, days for filing the first official grievance are counted from the day of the incident.

‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
Massachusetts Department of Correction	103 CMR 491.00 Effective 1/5/01	No‡	10 days*	10 days*	Automatic[19]	N/A
UMass Correctional Health (UMCH) Massachusetts Department of Correction	Policy and Procedures Manual No. 12 Approved 4/5/04	No‡	10 days*	10 days*	Not specified[20]	N/A
Michigan Department of Corrections	Policy Directive No. 03.02.130 Effective 12/19/03	Yes 2 days*	5 days*†	5 days*	10 days*	N/A
Minnesota Department of Corrections	Policy No. 303.100 Effective 5/1/05	Yes	Not specified[21]	15 days*	N/A	N/A
Mississippi Department of Corrections	Inmate Handbook, Chapter VIII	No‡	30 days	Not specified[22]	Not specified	N/A
Missouri Department of Corrections	Institutional Services Policy and Procedure Manual Procedure No. IS8-2.1 Effective 1/15/92	Yes 15 days	5 days*†	5 days*	10 days*	N/A
Montana State Prison Policies and Procedures	Policy No. 3.3.3 Effective 4/1/97	Yes 5 days*	3 days*†	3 days*	3 days*	N/A
Nebraska Department of Correctional Services	No. 217.02 Effective 12/19/85 References tit. 68, ch. 2 Nebraska Admin. Code	Yes 3 days	15 days†[23]	10 days	N/A	N/A
Nevada Department of Corrections	Admin. Regulation 740 Effective 1/5/04	Yes[24] 6 months[25]	5 days†	5 days	N/A	N/A
New Hampshire Department of Corrections	Statement No. 1.16 Effective 10/01/02	Yes 30 days	30 days†	30 days	N/A	N/A
New Jersey Department of Corrections	Internal Management Procedure IMM.RRP.003 IMM.002.001 Revised 8/1/03	No‡	Not specified	10 days*	N/A	N/A

* indicates working or business days. Otherwise, "days" are calendar days.

† indicates that first formal grievance deadline is measured from the response to an informal resolution attempt. Otherwise, days for filing the first official grievance are counted from the day of the incident.

‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
New Mexico Corrections Department	CD-150500 and 150501 Revised 6/22/05	Yes 5 days	20 days[26]	7 days	N/A	N/A
New York Department of Correctional Services	N.Y. Comp. Codes R. and Regs. Tit. 7, § 701.7 2005	No‡[27]	14 days	4 days*	4 days*	N/A
City of New York Department of Correction	Directive No. 3375R Effective 3/4/85	Not specified[28]	Not specified	Not specified[29]	Not specified	Not specified
North Carolina Department of Correction	Rules and Policies Inmate Booklet March 2002	Yes	1 year	Not specified[30]	Not specified	N/A
North Carolina Department of Juvenile Justice and Delinquency Prevention	Policy No. YD/DC 8.0 Effective 11/19/04	Yes	24 hours[31]	24 hours	24 hours	N/A
North Dakota Department of Corrections	Policies and Procedures Manual Revised 5/5/05	Yes 5 days	15 days	5 days[32]	5 days	N/A
Ohio Department of Corrections	Ohio Admin. Code § 5120-9-31	Yes 14 days	14 days†	14 days	N/A	N/A
Oklahoma Department of Corrections	OP-090124 Effective 10/11/05	Yes 3 days[33]	15 days[34]	15 days[35]	N/A	N/A
Oregon Department of Corrections	291-109-0100 *et seq.*	Yes[36]	30 days	14 days	14 days	N/A
Pennsylvania Department of Corrections	Policy No. DC-ADM 804 Effective 1/3/05	No‡	15 days*	10 days*	15 days*	N/A
Rhode Island Department of Corrections	R.I. Code R. 06 070 002 Effective 1/7/80	No	3 days	3 days*	3 days*	3 days*
South Carolina Department of Corrections	GA-01.12 Issued 11/1/04	Yes	15 days	5 days	30 days[37]	N/A

* indicates working or business days. Otherwise, "days" are calendar days.

† indicates that first formal grievance deadline is measured from the response to an informal resolution attempt. Otherwise, days for filing the first official grievance are counted from the day of the incident.

‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
South Dakota Department of Corrections	Admin. Remedy for Inmates Policy No. 1.3.E.2 8/22/05	Yes 30 days	5*†	10 days[38]	N/A	N/A
Tennessee Department of Corrections	Index No. 501.01 Effective 5/1/04	No	7 days[39]	5 days	5 days	N/A
Texas Department of Criminal Justice	Offender Orientation Handbook November 2004	Yes	15 days	15 days	N/A	N/A
Utah Department of Corrections	Institutional Operations Division Manual Revised 7/1/03	Yes 7 days*[40]	5 days*†	5 days*	N/A	N/A
Vermont Department of Corrections	Directive 320.01 320.01.01, 320.01.02 Effective 9/1/00	No[41]	Not specified	Not specified	N/A	N/A
Virginia Department of Corrections	Procedure No. DOP 866 Effective 11/20/98	Yes	30 days	5 days	5 days	N/A
Washington Department of Corrections	No. DOC 550.100 Effective 3/1/05	Yes	Not specified	Not specified[42]	Not specified	N/A
Clark County Sheriff's Office, Washington	Inmate Handbook	Yes	7 days	48 hours	48 hours	N/A
West Virginia Division of Corrections	W. Va. Code of State Rules § 90-9-3	No	15 days	5 days*	5 days*	N/A
Wisconsin Department of Corrections	Wisconsin Admin. Code § DOC 310.09 *et seq.*	No‡[43]	14 days	10 days	N/A	N/A
Wyoming Department of Corrections	Admin. Reg. No. 2.501 Revised 12/11/98	Yes 7 days	30 days	10 days	N/A	N/A

* indicates working or business days. Otherwise, "days" are calendar days.

† indicates that first formal grievance deadline is measured from the response to an informal resolution attempt. Otherwise, days for filing the first official grievance are counted from the day of the incident.

‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

[1] Because prison and jail grievance policies sometimes are not published in a readily available form, and because in some jurisdictions they may be revised frequently, these policies should be considered illustrative only. Amicus does not represent that these policies are the most current. The policies and materials that we relied on in compiling the chart are available on the LSO web site at www.law.yale.edu/Woodford.

[2] According to the Alabama Department of Corrections (DOC), the Alabama DOC grievance procedure is currently under review. *See* www.doc.state.al.us/adminregs.asp, last checked 1/24/06.

[3] The policy states, "[a]n appellant must submit the appeal within 15 working days of the event or decision being appealed, or of receiving an unacceptable lower level appeal decision." Calif. Code of Regs., tit. 15, § 3804.6(c) (2004).

[4] The Inmate Handbook states that grievances may be resolved at 5 levels – Food Manager, Correctional Officer, Correctional Corporal, Jail Division Command, and Under-Sheriff. The Under-Sheriff level is also characterized as an appeal. Glenn County Jail Handbook at 15-16, available at www.countyofglenn.net/Jail, last checked 1/24/06.

[5] The Connecticut Department of Correction policy applies both to jails and to prisons in Connecticut.

[6] An exception is provided for grievances regarding property, which must be filed within one year of discovery or three years of the occurrence. Connecticut Dept. of Correction Admin. Dir. 9.6(10)(G).

[7] Level 3 review is restricted to grievances which: 1) challenge department level policy; 2) are emergency and cannot be acted upon at subordinate level; 3) challenge integrity of the grievance process; or 4) did not receive a timely Level 2 response. Connecticut Dept. of Correction Admin. Dir. 9.6(17).

[8] The "Informal Resolution" stage of the process is also described as Level I of the process and requires the filing of a form within 7 calendar days of the incident. Delaware Bureau of Prisons Procedure No. 4.4, IGP Resolution Levels, revised 5/15/98.

[9] Grievances that are not resolved informally are automatically referred to the Resident Grievance Committee, which makes a recommendation to the Warden ("Level II"). Delaware Bureau of Prisons Procedure No. 4.4, IGP Resolution Levels, revised 5/15/98.

[10] The Warden's decision may be appealed to the Bureau's Grievance Officer ("Level III"). Delaware Bureau of Prisons Procedure No. 4.4, IGP Resolution Levels, revised 5/15/98.

[11] Informal resolution must be attempted within a "reasonable time." Rules of the Florida Dept. of Corrections, Ch. 33-103.011(1)(a), effective 10/9/05.

[12] Policy states that, "the specified time frame shall commence on the day following the date of the incident or response to the grievance at the previous level." Rules of the Florida Dept. of Corrections, Ch. 33-103.011, effective 10/9/05.

[13] Policy states that, "grievances shall be filed within 15 days from the date of the discovery of the event giving rise to the grievance, excluding Saturdays, Sundays, and holidays." Kansas Dept. of Corrections, Article 15 – Grievance Procedure for Inmates § 44-15-101b. The first step of the grievance process is that the inmate must seek informal, documented resolution through unit team. If no response within 10 days, may file grievance report directly with the warden; if unsatisfactory response to informal resolution, must file grievance within 3 calendar days of response to informal resolution request. Kansas Dept. of Corrections, Article 15 – Grievance Procedure for Inmates, § 44-15-102(a)(2) and (b).

[14] Informal resolution shall be attempted by staff after grievance is filed. If grievant is not satisfied with informal resolution, he must make a written request to Grievance Committee within 5 days of notice. Kentucky Dept. of Corrections, Policy No. 14.6II (J)(1)(b)(1) and (8), effective January 4, 2005.

[15] First letter to warden must be written within 90 days of the incident, but the policy also states that a grievance may be screened out if "initial request" is made more than 30 days from the event. Apparently, the policy was amended in September 2002 to lengthen the deadline for filing a grievance from 30 to 90 days; however, one provision states that a grievance may still be rejected if "there has been a time lapse of more than 30 days between the event and the initial request." *Compare* La. Admin. Code, tit. 22, pt. 1, § 325 (A)(2) and (G)(1)(A), amended LR 28:1993 (September 2002), *with* (F)(1)(a)(x).

[16] Appeal to Inmate Grievance Office. The Inmate Grievance Office may dismiss a grievance or refer for a hearing before an administrative law judge (ALJ). Code of Md. Regs. 12.07.01.07-08. The ALJ can either deny relief, or, if the ALJ determines that the prisoner's complaint is meritorious, submit a recommendation for relief to the Secretary. Code of Md. Regs. 12.07.01.10.

[17] This Maryland policy applies to pretrial detainees; the previous entry applies to sentenced prisoners.

[18] First appeal is to Inmate Grievance Procedure Committee, and deadline is not specified. Subsequent appeals to Warden and Commissioner must be made within 3 working days. Maryland Dept. of Public Safety and Correctional Services Division of Pretrial Detention and Services, Policy No. 180-1 V (B)(1), (C)(1), (D)(1), issued November 30, 2000.

[19] Appeal to Superintendent must be made in 10 working days. Central office reviews denials of relief by the Superintendent automatically. 103 CMR §§ 491.12(1) and 491.13.

[20] Appeal to UMCH Medical Director must be made in 10 business days. Timeframe for second appeal, to DOC Health Services Division, is not specified. Univ. of Massachusetts Correctional Health, Massachusetts Dept. of Correction, Policy & Procedures Manual, No. 12, Procedure 3(b) and 5(a), effective 4/5/04.

[21] Inmate must have at least 40 days until release to file a grievance. Minnesota Dept. of Corrections Policy No. 303.100, Procedures (A)(1), effective 5/1/05.

[22] Mississippi Department of Corrections Inmate Handbook refers to "Steps Two and Three" of the grievance procedure, but does not specify timelines. Mississippi Dept. of Corrections Inmate Handbook, Chapter VIII.

[32] First formal grievance must be filed within 15 calendar days of response to request for informal resolution, or, if no response is received, within 20 days of the incident. Nebraska Admin. Code, tit. 68, ch.2, § 004.02.

[34] This required first step is actually quite formal, requiring the inmate to submit a written "request slip," detailing his allegations; the complaint is not termed a "grievance," however, until it is filed with the Warden. New Hampshire Dept. of Corrections Policy and Procedure Directive No. 1.16 IV, reviewed 10/01/03.

[35] Informal resolution must be attempted within 6 months for personal property damage or loss, personal injury, medical claims, other tort claims, or civil rights claims. For all other issues, it must be attempted within 10 calendar days. Nevada Dept. of Corrections, Admin. Reg. 740, 1.4.1.1, effective 1/5/04.

[36] Policy states that formal grievance must be filed within 20 days of the date of the Inmate Informal Complaint. New Mexico Corrections Dept., CD-150-501 (A)(1), revised 6/22/05.

[37] Informal resolution is not a condition of filing a grievance, but policy states that an inmate's failure to attempt informal resolution may result in dismissal of grievance. N.Y. Comp. Codes R. & Regs., tit. 7, § 701.3(a)(2005).

[38] Inmate files a grievance with committee. If it is not informally resolved, inmate may request a formal hearing. City of New York Dept. of Correction, Classification No. 3375R III (B)(1) and (2), effective 3/4/85.

[39] Three appeals – to Warden, Central Office Review Committee, and the Board of Correction/Commissioner – are available. However, policy specifies no deadlines. City of New York Dept. of Correction, Classification No. 3375R III (B)(3)-(5), effective 3/4/85.

[40] Two levels of appeal are provided – to Region Director/Institution Head and to Grievance Examiner/Secretary of Correction. However, Inmate Rules and Policies Booklet specifies no deadlines for these appeals. North Carolina Dept. of Corrections Rules and Policies § 20 (6) (March 2002)

[41] North Carolina Department of Juvenile Justice and Delinquency Prevention Policy No. YD/DC 8.0 does not specify a timeframe for the first official grievance to Human Services Coordinator. North Carolina Dept. of Juvenile Justice and Delinquency Prevention, Policy No. YD/DC 8.0, effective 11/19/04. However, the Nondisciplinary Grievance Report Form states, "If you have a complaint or grievance, fill out this form and give it to the human services coordinator within 24-hours of the incident."

[42] Policy states both "5 working days" and "5 days." *Compare* North Dakota Dept. of Corrections Inmate Grievance Procedure VI (I)(1)(g) with VI (I)(2)(a) and (3)(a), revised 5/5/05.

[43] Inmate must speak with staff within 3 days of incident. If complaint not resolved, inmate must submit "Request to Staff" within 7 calendar days of incident. Oklahoma Dept. of Corrections, OP-090124 IV (A) and (B), effective 10/11/05.

[44] Inmate must submit formal grievance within 15 calendar days of incident or date of the response to the "Request to Staff" form, whichever is later. Oklahoma Dept. of Corrections, OP-090124 V(A)(1), effective 10/11/05.

[45] Appeal allowed only if new evidence is uncovered or probable error. Oklahoma Dept. of Corrections, OP-090124 VII, effective 10/11/05.

[46] Inmate must attempt both verbal and written informal resolution. Oregon Admin. Rules 291-109-0140 (1)(a).

[47] First appeal is to Division Director of Operations. Some issues may then be appealed to. South Carolina Administrative Law Judge Division (ALJ). South Carolina Dept. of Corrections Policy No. GA-01.12 (13.4)-(13.6), issued 11/1/04.

[48] Warden's response may only be appealed to the Secretary of Corrections if complaint concerns a major disciplinary action – a classification action, or a decision regarding the restoration of good time credits. South Dakota Dept. of Corrections Admin. Remedy for Inmates, Policy No. 1.3.E.2, Appeals to the Secretary of Corrections (Aug. 22, 2005).

[49] There is an exception for Title VI complaints, which must be filed within 180 days of the occurrence of the alleged discriminatory act. Tennessee Dept. of Corrections, Admin. Policies & Procedures, Index No. 501.01 VI (C)(1), effective 5/1/04.

[50] "Level One" of the process is described as "Informal." Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.03(A), revised 7/1/03. The Manual also requires inmates to document reasonable attempts to resolve complaints informally. *Id.* at FDr02/02.08(A)(1).

[51] Vermont Dept. of Corrections Procedure No. 320.01.01(4)(I), effective 9/1/00, states, "[s]taff at all levels will make every effort to resolve issues before they escalate to grievances. However, if the offender desires to formally grieve an issue, staff will provide the offender with grievance form #1."

[52] The policy refers to two levels of appeal, but no timelines are specified. Washington Dept. of Corrections, No. DOC 550.100 IV, effective 3/1/05.

[53] The policy states that prior to accepting a complaint, grievance officials may direct the inmate to attempt to resolve the issue. Wis. Admin. Code § 310.09 (4) (2005).

(9)

No. 05-416

FILED
FEB 1 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JEANNE S. WOODFORD, WARDEN, A.P. KANE

Petitioners,

v.

VIET MIKE NGO

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF RESPONDENT

[Law Professors Listed On Inside Cover]

KERMIT ROOSEVELT III
University of Pennsylvania
Law School
3400 Chestnut St.
Philadelphia, PA 19104
215.746.8775

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF *AMICI* AND COUNSEL*

ERWIN CHEMERINSKY
Alston & Bird
Professor of Law and
Political Science
Duke University

DAVID L. FRANKLIN
Assistant Professor
DePaul University
College of Law

AMANDA FROST
Assistant Professor of Law
American University
Washington College of Law

ALAN HYDE
Professor and
Sidney Reitman Scholar
Rutgers University
School of Law
Visiting Professor,
Cornell Law School

SETH KREIMER
KENNETH W. GEMMILL
Professor of Law
University of Pennsylvania
Law School

DANIEL MANVILLE
Clinical State Attorney
Wayne State University
School of Law

TREVOR MORRISON
Assistant Professor of Law
Cornell Law School

JOHN OAKLEY
Professor of Law and
Associate in the
Department of Philosophy
University of California
at Davis Vice-Chair,
Academic Senate of the
University of California
Faculty Representative,
Board of Regents of the
University of California

MALLA POLLOCK
Professor, American Justice
School of Law
Visiting Professor,
University of Idaho,
College of Law

JON ROMBERG
Associate Professor
Seton Hall University
School of Law

KERMIT ROOSEVELT III
Assistant Professor
University of Pennsylvania
Law School

DAVID RUDOVSKY
Senior Fellow
University of Pennsylvania
Law School

ANDREW M. SIEGEL
Assistant Professor of Law
University of South
Carolina School of Law

---

* Institutional affiliations are provided for identification purposes only.

CATHERINE STRUVE
Professor of Law
University of Pennsylvania
Law School

STEPHEN I. VLADECK
Associate Professor
University of Miami
School of Law

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of Amici Curiae	1
Summary of Argument	1
Argument	2
I. Original Proceedings Differ from Review Proceedings	2
II. Inmate Section 1983 Suits Are Original Proceedings	5
III. Procedural Errors Bar Review Proceedings, Not Original Proceedings	6
IV. The Text of the PLRA's Exhaustion Requirement Does Not Support a Procedural Default Rule	11
V. Policy Considerations Do Not Support the Addition of a Procedural Default Rule	14
Conclusion	22

TABLE OF AUTHORITIES

Page

CASES:

Abbruzzese v. Railroad Ret. Bd., 63 F.3d 972 (10th Cir. 1995) 9

Booth v. Churner, 532 U.S. 731 (2001) 14

Brown v. Allen, 344 U.S. 443 (1953) 12

Burnett v. Grattan, 468 U.S. 42 (1984) 16, 19

Castille v. Peoples, 489 U.S. 346 (1989) 12

Cleavinger v. Saxner, 474 U.S. 193 (1985) 18

Coleman v. Thompson, 501 U.S. 722 (1991) 6, 12

Cunningham v. Railroad Ret. Bd. 392 F.3d 567 (3d Cir. 2004) 8, 9

EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988) 4, 15

Engle v. Isaac, 456 U.S. 107 (1982) 12

Fay v. Noia, 372 U.S. 391 (1963) 2, 7, 12

Gray v. Netherland, 518 U.S. 152 (1997) 6, 7, 12

Gutierrez v. Railroad Ret. Bd., 918 F.2d 567 (6th Cir. 1990) 8

Hameetman v. City of Chicago, 776 F.2d 636 (7th Cir. 1985) 5

Harris v. Railroad Ret. Bd., 198 F.3d 139 (4th Cir. 1999) 9

Harris v. Reed, 489 U.S. 255 (1985) 7

Love v. Pullman Co., 404 U.S. 522 (1972) 15

McCarthy v. Madigan, 503 U.S. 140 (1992) 19

TABLE OF AUTHORITIES – Continued

Page

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 4

Muhammad v. Close, 540 U.S. 749 (2004) 19

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 12, 13

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 4, 14, 15, 16, 17

Porter v. Nussle, 534 U.S. 516 (2002) 14

Pozo v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002) 21

Preiser v. Rodriguez, 411 U.S. 475 (1973) 19

Rivera v. Railroad Ret. Bd., 262 F.3d 1005 (9th Cir. 2001) 9

Sones v. Railroad Ret. Bd., 933 F.2d 636 (8th Cir. 1991) 9

Sswajje v. Ashcroft, 350 F.3d 528 (6th Cir. 2003) 9, 10

Steebe v. U.S. Railroad Ret. Bd., 708 F.2d 250 (7th Cir. 1983) 9

Strong v. David, 297 F.3d 646 (7th Cir. 2002 16

Szostak v. Railroad Ret. Bd., 370 F.2d 253 (2d Cir. 1960) 9

Thomas v. Woolum, 337 F.3d 720 (6th Cir. 2003) 15

United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952) 8, 10

United States v. Wells, 519 U.S. 482 (1997) 12

Wainwright v. Sykes, 433 U.S. 72 (1977) 7, 18

Wendell v. Asher, 162 F.3d 887 (5th Cir. 1998) 21

TABLE OF AUTHORITIES – Continued

Page

Wilkinson v. Dotson, 125 S.Ct. 1242 (2005) 19

Wolff v. McDonnell, 418 U.S. 539 (1974) 18

FEDERAL STATUTES AND REGULATIONS:

5 U.S.C. § 706 4

8 U.S.C. § 1252 ..... 4, 8, 9

28 U.S.C. § 1915 20

28 U.S.C. § 2254 ..... 3, 7

28 U.S.C. § 2401 13

29 U.S.C. § 633 4

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1997e 5, 11, 13, 20

42 U.S.C. § 2000e 4, 13

45 U.S.C. § 355 8

STATE STATUTES AND REGULATIONS:

20 Ill. ADC § 504.810 17

27 Ill. Reg. 6214 (2003) 17

Wisc. Admin. Code § DOC 310.09(6) 17

Wisc. Admin. Code § DOC 310.13(2) 17

OTHER AUTHORITIES:

142 Cong. Rec. S2219-03 (daily ed. Mar. 18, 1996) 20

141 Cong. Rec. S14,627 (daily ed. Sept. 29, 1995) 20

110 Cong. Rec. 12725 (1964) 15

TABLE OF AUTHORITIES – Continued

Page

Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 Emory L. J. 1771 (2003) 7, 13, 15, 21

INTEREST OF AMICI CURIAE[1]

Amici Curiae are law professors who teach and write in the areas of federal jurisdiction, constitutional law, and civil rights. They believe that this case presents a question of great importance regarding the availability of federal judicial relief for violations of inmates' constitutional rights. They seek to bring to the Court's attention an analytic point outside the parties' main focus, which they believe offers substantial guidance in deciding this case. Amici have no financial interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

Neither petitioners nor the Solicitor General acknowledge the key distinction between original proceedings, which seek judicial review of out-of-court conduct, and review proceedings, which seek review of the decision of some other adjudicator. In the context of review proceedings, procedural errors in the course of exhaustion naturally create bars because the decision under review will rest on a procedural ground. In such circumstances, both when applying the procedural default doctrine in habeas jurisprudence and when applying waiver or forfeiture rules in administrative law cases, federal courts will typically not reach the merits of the litigant's claims. But

[1] The parties have consented to the filing of this amicus brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than amici curiae and their counsel has made a monetary contribution to the preparation and submission of this brief.

this rule is not the operation of an exhaustion requirement alone; it stems from the nature of review proceedings.

In original proceedings, by contrast, procedural errors in an unrelated proceeding do not create bars. Although original proceedings following exhaustion requirements are rare, courts in such cases reach the merits despite procedural errors. Title VII and the Age Discrimination in Employment Act are instructive examples, as is this Court's habeas jurisprudence under the regime of *Fay v. Noia*, 372 U.S. 391 (1963).

Once the confusion between original proceedings and review proceedings is clarified, petitioners' position boils down to policy arguments that the goals of the Prison Litigation Reform Act will be defeated without some judicially-created analogue to the procedural default doctrine. A closer analysis of the PLRA reveals, however, that such a rule is not necessary to protect the statute's aims. The PLRA has succeeded quite well in reducing frivolous lawsuits without any procedural bar, and imposing one would preclude a substantial number of meritorious claims, something the PLRA's drafters did not intend.

ARGUMENT

I. Original Proceedings Differ from Review Proceedings

The conceptual key to this case is a distinction, which neither petitioners nor the Solicitor General address, between two different types of legal proceedings. In the first type, an original proceeding, the court is simply determining the legality of out-of-court action. The plaintiff asserts that some actor has violated his rights and

asks the court to assess the legality of that actor's conduct. Most actions filed in federal district court are of this sort, with habeas petitions being the most notable exception.

The second type of proceeding, a review proceeding, asks a court to review the decision of some other adjudicator. In this second type of case, the court need not make its own decision as to the legality of the out-of-court action that formed the basis for the claim presented to that initial adjudicator. It need only determine whether the other adjudicator's decision should be sustained or overturned. An ordinary appeal is the most obvious example of this type of claim. Other examples include habeas petitions, which ask federal courts to review the decisions of state courts, and suits under the Administrative Procedure Act or agency-specific statutes, which ask them to review agency decisionmaking.

An exhaustion requirement imposes a prerequisite to a federal judicial hearing. It ensures that some other decision will precede the federal hearing, and it raises the possibility that the federal hearing will be a review proceeding determining the correctness of that decision. But an exhaustion requirement does not, by itself, convert the federal hearing into a review proceeding. That depends on the statute under which the plaintiff brings suit.

That statute might direct the federal court to review the prior decision and set out standards of review. For instance, the habeas statute, 28 U.S.C. § 2254(d), instructs federal district courts to decide whether a state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." On factual questions, § 2254(e) prescribes that state-court

factual determinations "shall be presumed to be correct" and that the habeas applicant "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." The Administrative Procedure Act, likewise, clarifies that APA suits are typically review proceedings by instructing courts to focus on agency decisions and setting out standards of review such as "substantial evidence" and "arbitrary, capricious [or] an abuse of discretion." See 5 U.S.C. § 706. So, too, do agency-specific statutes such as the Immigration and Nationality Act, 8 U.S.C. § 1252(b)(4).

On the other hand, if the statute does not direct the court to review the prior decision or set out a standard of review, the natural conclusion is that a suit under that statute is an original proceeding. For instance, the Age Discrimination in Employment Act ("ADEA") requires would-be plaintiffs to commence available state proceedings and let them continue for sixty days or to termination before filing a federal suit. See 29 U.S.C. § 633(b); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 753 (1979). Title VII of the Civil Rights Act of 1964 has a similar commencement provision and further requires would-be plaintiffs to file a complaint with the Equal Employment Opportunities Commission ("EEOC") and to receive a right-to-sue letter before initiating a federal action. See 42 U.S.C. § 2000(e)-5(e); *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 110-111 (1988). But neither statute directs federal courts to review state decisions or those of the EEOC, and suits under Title VII or the ADEA are consequently original proceedings. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-799 (1973) (explaining that Title VII suits are "*de novo* proceedings" rather than review of EEOC determinations).

II. Inmate Section 1983 Suits Are Original Proceedings

42 U.S.C. § 1983 allows individuals to seek a federal remedy for violations of their federal rights. Section 1983 suits are original proceedings. They do not ask federal courts to review the decisions of state courts or administrative bodies; they ask for review of out-of-court conduct claimed to violate federal rights. See, e.g., *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985) ("A suit under 42 U.S.C. § 1983 is not a mode of judicial review of a state administrative agency's or state court's action.") (Posner, J.).

The Prison Litigation Reform Act ("PLRA") has not changed the nature of § 1983 suits. The PLRA's exhaustion requirement, 42 U.S.C. § 1997e(a), provides that no inmate may bring suit under any federal law "until such administrative remedies as are available are exhausted." But unlike the habeas statute and the APA, the PLRA does not instruct federal courts hearing § 1983 suits brought by inmates to review the decisions of prison administrators or set out a standard of review. The statute gives no indication of an intent to transform § 1983 suits into review proceedings. The Solicitor General concedes that an inmate's § 1983 suit is a "*de novo*" proceeding. U.S. Br. 14 n.6.

Indeed, it is quite hard to imagine how a § 1983 suit could be a review of prison grievance proceedings. Such proceedings may not produce any reviewable findings, and they are not subject to the same due process constraints as trials or most administrative hearings; they may be inquisitorial rather than adversarial, and may restrict an inmate's ability to call witnesses or testify. Frequently,

prison administrators lack the ability to consider constitutional arguments or award the relief that a § 1983 plaintiff seeks, so overturning the denial of a grievance would not have the same consequences as ruling in an inmate's favor on an original § 1983 claim. (For descriptions of some prison grievance systems, see Brief of Jerome N. Frank Legal Services Organization as Amicus Curiae in Support of Respondent.)

III. Procedural Errors Bar Review Proceedings, Not Original Proceedings

The distinction between original and review proceedings is crucial for determining the consequence of a procedural error. In a review proceeding, the court assesses the decision of some other adjudicator. If that decision rests on a valid procedural ground, the court will usually uphold it as correct without reaching the merits of the plaintiff's claim.

It is this principle, and not exhaustion by itself, that is at work in the contexts in which improper exhaustion has been held to bar subsequent suit. In the habeas context, a prisoner who fails to observe state procedural rules "meets the technical requirements for exhaustion." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). What bars his petition is the doctrine of procedural default: federal courts will not consider the merits of claims rejected by state courts on procedural grounds. See, e.g., *Gray v. Netherland*, 518 U.S. 152, 161-162 (1997) (discussing procedural default).

Procedural default, as this Court has repeatedly explained, "has its historical and theoretical basis in the 'adequate and independent state ground doctrine.'" *Harris*

v. Reed, 489 U.S. 255, 260 (1985). That is, procedural default is not merely a rule created by the Court for policy reasons; nor is it an inherent feature of exhaustion requirements. It exists because habeas petitions are review proceedings and federal courts cannot disrupt state judgments that rest on state-law grounds such as state procedural rules. See, e.g., *Gray*, 518 U.S. at 162 ("the procedural bar . . . provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default").

The operation of an exhaustion requirement by itself is seen in this Court's earlier habeas decisions such as *Fay v. Noia*, 372 U.S. 391 (1963), which reached the merits of habeas petitioners' claims despite procedural errors.* The introduction of the procedural default doctrine in *Wainwright v. Sykes*, 433 U.S. 72 (1977), resulted from a change in the Court's understanding of the nature of habeas – a change from an original proceeding to a review proceeding – which was subsequently codified in current 28 U.S.C. § 2254. See generally Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 Emory L. J. 1771, 1788-1798 (2003) (hereinafter "Exhaustion") (discussing procedural default and adequate and independent state ground and noting shift from original to review proceeding).

---

* *Noia* did note that federal courts could deny relief to inmates who had "deliberately bypassed the orderly procedure of the state courts." 372 U.S. at 438. Amici take no position on whether a similar rule would be appropriate in the context of inmate § 1983 suits.

In the administrative law context, likewise, failure to observe an agency's procedural requirements will produce an agency decision resting on a procedural ground. If the application of the procedural requirement is correct, that decision cannot be overturned in a review proceeding. As this Court has explained, "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines Inc.*, 344 U.S. 33, 37 (1952).

The Solicitor General offers two contexts in which, he argues, federal appellate courts have interpreted exhaustion provisions to require timely presentation of claims to administrative agencies: the Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f), and the Immigration and Nationality Act, 8 U.S.C. § 1252(d)(1).

The Railroad Unemployment Insurance Act in fact uses language quite different from that of the PLRA. It permits review of "final decisions" on the condition not simply that remedies "are exhausted" but that they "*will have been availed of* and exhausted." 45 U.S.C. § 355(f) (emphasis added). This language might indeed be understood to require that the plaintiff make timely filings in order to "avail" himself of administrative remedies. In fact, however, it has generally not been understood that way. The Solicitor General's suggestion that courts of appeals have "uniformly" concluded that untimely claims constitute a failure of exhaustion, U.S. Br. 11, is a substantial overstatement. That is a minority position among the circuits, held by the Third and the Sixth. See *Cunningham v. Railroad Ret. Bd.*, 392 F.3d 567, 572 (3d Cir. 2004); *Gutierrez v. Railroad Ret. Bd.*, 918 F.2d 567, 5670 (6th Cir. 1990).

The Fourth, Seventh, Ninth, and Tenth Circuits, by contrast, have not found a failure to exhaust but rather concluded that a Board decision dismissing an appeal as untimely is not a "final decision" and therefore not reviewable. See *Rivera v. Railroad Ret. Bd.*, 262 F.3d 1005, 1010-1011 (9th Cir. 2001) (decision not "final" because not "on the merits"); *Harris v. Railroad Ret. Bd.*, 198 F.3d 139, 141-142 (4th Cir. 1999) (decision to reopen not provided for by statute, hence not susceptible to judicial review) *Abbruzzese v. Railroad Ret. Bd.*, 63 F.3d 972, 974 (10th Cir. 1995) (decision not to reopen is "discretionary, and as such, is nonfinal and unreviewable"); *Steebe v. U.S. Railroad Ret. Bd.*, 708 F.2d 250, 254 (7th Cir. 1983) (no review because reopening decision not provided for by statute); *Cunningham*, 392 F.3d at 572 n.6 (discussing split). The Second and the Eighth Circuits will in fact review decisions not to reopen under an abuse of discretion standard. See *Sones v. Railroad Ret. Bd.*, 933 F.2d 636, 638 (8th Cir. 1991); *Szostak v. Railroad Ret. Bd.*, 370 F.2d 253, 254 (2d Cir. 1960). And some circuits will review the decisions if they present colorable constitutional issues. See, e.g., *Harris*, 198 F.3d at 142-143 (citing cases).

The Immigration and Nationality Act cases are similar. The statutory language, requiring that "the alien has exhausted all administrative remedies available," could be read to require active utilization of remedies. 8 U.S.C. § 1252(d)(1). (As the next section of this brief shows, however, this Court has rejected that reading of the similar language in the habeas statute.) Some circuits have held that an untimely appeal of an immigration judge's decision is a failure to exhaust. See, e.g., *Sswajje v. Ashcroft*, 350 F.3d 528, 532 (6th Cir. 2003). But what they mean by this is that because the agency decision rests on a

procedural ground, a reviewing court will not reach the merits; it is the procedural ground, if anything, that is reviewable. The *Sswajje* court did indeed review the agency's decision not to entertain the untimely appeal, something that a true failure to exhaust should have prevented. See *ibid.*

What all the circuits agree on with respect to both statutes is that plaintiffs who have committed a procedural error cannot obtain judicial review of the merits of the agency's handling of their claim. They are entitled, at most, to review of the procedural decision to dismiss the appeal or not to reopen the proceeding. That is certainly correct, but it is not really the operation of an exhaustion requirement – or at least, it is the operation of an exhaustion requirement only in the context of a review proceeding. It is, like the procedural default rule in habeas, a recognition of the two crucial facts that (1) the plaintiffs are attacking a prior decision and (2) a procedural ground may shield that decision in a review proceeding.

The same reasoning underlies the *L.A. Tucker* principle that the Solicitor General endorses as a general statement of the administrative exhaustion rule, U.S. Br. 11: waiver limits the possible grounds of review. That reasoning has no application to an original proceeding such as a § 1983 action, because an original proceeding does not seek review of any prior decision. The basis for the earlier decision is thus irrelevant; a procedural disposition is no different from a decision on the merits. Procedural errors do not bar subsequent original proceedings.

IV. The Text of the PLRA's Exhaustion Requirement Does Not Support a Procedural Default Rule

The conclusion that follows from the preceding sections is there is no logical reason that an exhaustion requirement should convert a procedural error into a bar for a subsequent original proceeding. Such a bar does arise in subsequent review proceedings, but that is because they are review proceedings, not because of the exhaustion requirement. (Indeed, the bar arises in review proceedings even in the absence of an exhaustion requirement.) Congress could, however, have written a statute that imposed such a bar on inmates who failed to meet time limits, and it is therefore necessary to consider the text of the PLRA.

The Solicitor General's "textual" argument is that this Court should substitute "properly exhausted" for "exhausted" in § 1997e. U.S. Br. 9-10. As the preceding section demonstrated, that argument is supported by a minority of the federal circuits in some administrative contexts, resoundingly rejected by this Court's habeas decisions, and conceptually flawed in any event because it relies on cases dealing with review proceedings.

Petitioners offer a different textual argument, that whether remedies have been exhausted depends not on whether they are available, but whether they have been used. That is, they suggest that a prisoner must in fact *use* a remedy in order to exhaust it – invoking the remedy and having the request denied on non-merits grounds is not enough. Pet. Br. 14-15. The argument would be more plausible if the PLRA employed an active voice, requiring, as does the habeas statute, that "the applicant ha[ve] exhausted the remedies available." But it would still be wrong. In the habeas context, that reading was endorsed

by this Court in *Brown v. Allen*, 344 U.S. 443, 484-487 (1953) (interpreting 1948 statute), but then rejected ten years later by *Fay v. Noia*, 372 U.S. 391, 434 (1963), which pronounced it "refuted by the language of the statute and by its history."

On other points, *Noia* has itself been overruled by *Coleman v. Thompson*, 501 U.S. 722 (1991). But its interpretation of "exhausted" stands. For over forty years now, this Court's habeas cases have repeatedly made clear that availability of remedies is the sole criterion for exhaustion. Proper use or invocation of remedies is not required, for the exhaustion requirement "refers only to remedies still available at the time of the federal petition." *Engle v. Isaac*, 456 U.S. 107, 126 n.28 (1982). Once remedies are unavailable, for whatever reason, an exhaustion requirement is satisfied. This understanding of exhaustion was clear at the time the PLRA was enacted. See, e.g., *Gray v. Netherland*, 518 U.S. 152, 161 (1996) (exhaustion requirement "is satisfied 'if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law'") (alterations in original) (quoting *Castille v. Peoples*, 489 U.S. 346, 351 (1989). Given that the Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents, *United States v. Wells*, 519 U.S. 482, 495 (1997), Congress's choice to require only that "such administrative remedies as are available are exhausted" should be understood to incorporate the availability test, not the distinct doctrine of procedural default.

Petitioners and the Solicitor General seem to suggest that the Court abandoned this understanding in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Pet. Br. 27-28; U.S. Br. 12-13. Even if true, the suggestion would not be

relevant to the interpretation of a statute enacted in 1996. But it is not true. *Boerckel* explicitly distinguished between the exhaustion question ("whether a prisoner has exhausted his state remedies," 526 U.S. at 848) and the procedural default question ("whether he has *properly* exhausted those remedies," *ibid.* (emphasis in original)). When the Court found that the petitioner had not properly exhausted his state remedies, it concluded not that he had failed to exhaust them, but that he "ha[d] procedurally defaulted his claims." *Ibid.* See generally Roosevelt, *Exhaustion*, 52 Emory L.J. at 1785-88 (discussing *Boerckel*).

Congress could have required inmates to comply with procedural requirements on pain of forfeiting their right to an original § 1983 action. In Title VII, for instance, Congress required would-be plaintiffs to make a timely filing with the EEOC or suffer just such a forfeiture, even though the Title VII suit is an original proceeding. See 42 U.S.C. § 2000e-5(e). In setting the general limitations period for suits against the United States, Congress again placed an explicit forfeiture condition on timely administrative filings: "A tort claim against the United States shall be *forever barred* unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . . " 28 U.S.C. § 2401(b) (emphasis added).

But the PLRA does not impose such a requirement. Instead, Congress used the standard language of exhaustion, explicitly setting "availab[ility]" of administrative remedies as the test for whether a federal suit can be filed. See 42 U.S.C. § 1997e(a). And because a § 1983 suit is an original proceeding, a bar does not arise naturally as it does in review proceedings such as habeas petitions or

review of administrative decisions. To impose a bar as a penalty for improper exhaustion would be to rewrite the statute and add a condition that Congress omitted.

V. Policy Considerations Do Not Support the Addition of a Procedural Default Rule

The Court's analysis might well stop at this point. But consideration of the policy issues at stake is worthwhile, for it demonstrates that the statute Congress wrote is a sensible and well-functioning one. It accommodates both the goal of reducing the number of frivolous suits and the goal of allowing inmates with valid claims a day in court, and it does not require judicial augmentation.

The purpose of the PLRA exhaustion requirement is "to reduce the quantity and improve the quality of prisoner suits" by affording "corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 524-525 (2002). Some inmates may be satisfied with the administrative remedy they receive, thereby "obviat[ing] some litigation." *Booth v. Churner*, 532 U.S. 731, 736 (2001). Congress hoped, that is, that at least some complaints could be resolved to the inmate's satisfaction through the grievance process, without making a federal case out of them.

These policy concerns are familiar; they are the same ones that inspired Congress to require would-be plaintiffs under Title VII and the ADEA to invoke state remedies before filing a federal suit. See *Oscar Mayer*, 441 U.S. at 755 (noting that Congress required the commencement of state proceedings "to screen from the federal courts those problems of civil rights that could be settled to the

satisfaction of the grievant 'in a voluntary and localized manner") (quoting 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey); *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 127 (1988); *Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003) (noting analogy). This Court has already considered whether those policy concerns make it appropriate to impose a bar on would-be plaintiffs who fail to meet state procedural requirements. It has said that they do not, for reasons strikingly applicable to the context of PLRA exhaustion.*

In *Oscar Mayer*, the Court noted that imposing a bar to ADEA suits by plaintiffs who had failed to observe state procedural rules would be particularly inappropriate "in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." 441 U.S. at 760 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). Given that the ADEA contained its own limitations period, the Court declined to impute to Congress an intent to "incorporate by reference into the ADEA the various state age-discrimination statutes of limitations . . . particularly since, in many States . . . the limitations periods are considerably shorter" than the federal limits. *Id.* at 763. The Court also noted the concern that requiring compliance with state

---

* Admittedly, the *Oscar Mayer* Court apparently thought that there was something different about exhaustion. See 441 U.S. at 761 (noting that the ADEA commencement provision "does not stipulate an exhaustion requirement"). The Court did not explain this remark any further, but it may have stemmed from an assumption that a suit following exhaustion is necessarily a review proceeding. If that were the case, procedural error in the course of exhaustion would invariably produce a bar. But as the preceding parts of this brief have demonstrated, the assumption is false. A Section 1983 suit filed after exhaustion of administrative remedies is an original action, and an exhaustion requirement does not necessarily include a procedural default doctrine.

procedural rules would allow "localities hostile to civil rights [to] enact sham discrimination ordinances for the purpose of frustrating the vindication of federal rights." *Ibid.*

Each of these concerns operates with equal force in the context of PLRA exhaustion. Inmates are extremely unlikely to have the assistance of counsel when they are pursuing administrative remedies. Administrative deadlines are far shorter than the limitations periods for § 1983 actions, generally requiring inmates to act within a few weeks or even a few days. See Brief of Jerome N. Frank Legal Services Organization as Amicus Curiae in Support of Respondent (describing state grievance procedures). Making these deadlines into de facto limitations periods would have grave consequences for the ability of inmates to obtain a judicial hearing, a result this Court has rejected before. See *Burnett v. Grattan*, 468 U.S. 42 (1984) (holding state administrative filing deadline inappropriate for incorporation as limitations period for § 1983 suit).

Worse, barring the § 1983 suits of inmates who have failed to comply with procedural requirements gives prison administrators an undesirable incentive to use their grievance systems not as problem-solving devices but as litigation defenses, erecting higher procedural hurdles and refusing to address the merits of inmate grievances. Indeed, evidence suggests that administrators have responded to federal decisions imposing such a bar in just this way. Following the Seventh Circuit's decision in *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002), which announced that grievances "must contain the sort of information that the grievance system requires," Illinois amended its grievance procedures to require that each grievance "contain factual details regarding each aspect of

the offender's complaint including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint." See 27 Ill. Reg. 6214 (2003) (amending 20 Ill. ADC § 504.810).

On the other side of the balance, *Oscar Mayer* identified as the "strongest argument" the fear that without a bar, plaintiffs might simply "wait[] until the state statute of limitations has expired and then fil[e] federal suit, thus frustrating the intent of Congress that federal litigation be used as a last resort." 441 U.S. at 764. This is the same policy concern that petitioners invoke. See Pet. Br. 19. But the *Oscar Mayer* Court went on to discount this fear, noting that "no reason suggests itself . . . why an employee would wish to forgo an available state remedy." *Ibid.* The same point holds for inmates.

Indeed, in the PLRA context, it is considerably stronger. Because prison administrators generally have the power to hear untimely grievances, prisoners cannot simply wait until filing deadlines have passed: administrative remedies will remain available until they have been sought and denied. See, e.g., Wisc. Admin. Code §§ DOC 310.09(6); 310.13(2) (2005). Thus, prisoners cannot exhaust remedies by neglect, or skip the process; they will still be required to file grievances and pursue them through the entire administrative process before they can initiate a federal suit. These filings will give administrators the ability to act on the grievances or create records if they choose. Imposing a bar on inmates who make procedural errors is not necessary to protect the policy aims of the exhaustion requirement. See generally Roosevelt, *Exhaustion*, 52 Emory L. J. at 1808-1814.

Petitioners argue that the appropriate analogy for policy analysis is not the commencement requirements of Title VII and the ADEA but rather the exhaustion requirement of federal habeas. See Pet. Br. 26-30. But the policy considerations that the Court has identified as supporting the procedural default rule in the habeas context do not apply in the same way to PLRA exhaustion. In the habeas context, procedural default operates to protect the role of state courts as the preferred fora for the determination of whether criminal defendants may be deprived of liberty. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (noting that criminal trials should be "the main event" and not a "tryout on the road" to federal habeas). State courts are equally competent to decide federal constitutional claims, and they have primary responsibility for the application and enforcement of state criminal law. The procedural default rule protects state judgments from unwarranted disruption by federal courts.

The same arguments cannot be made with respect to prison grievance proceedings and § 1983 suits. Prison administrators are not equally competent to decide federal constitutional claims; frequently they are not even empowered to consider such claims. Nor must their hearings comply with the due process requirements that govern suits in federal and state court, and even prison disciplinary proceedings resulting in the loss of good time credits, see *Wolff v. McDonnell*, 418 U.S. 539 (1974). See generally *Cleavinger v. Saxner*, 474 U.S. 193, 203-04 (1985) (noting differences between judicial proceedings and prison disciplinary proceedings). Administrative grievance proceedings cannot be the main event in a prisoner's civil rights suit; as this court has noted, "the dominant characteristic of civil rights actions" is that

"they belong in court." *Burnett*, 468 U.S. at 50. And because a § 1983 suit does not attack grievance proceedings, they do not need, and cannot sensibly be given, the protection of a procedural default rule.*

Imposing a bar on prisoners who make procedural errors in the course of exhaustion is supported neither by the text of the statute, nor by the policy goals behind exhaustion. Such a bar would certainly "filter out" a large number of civil rights suits, but it would do so on a basis unrelated to their merits. Indeed, because recreational litigators are likely to have more experience with the grievance system, a procedural default rule would tend to block meritorious claims, rather than frivolous ones. See *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("As a practical matter, the filing deadlines, of course, may pose little difficulty for the knowledgeable inmate accustomed to grievances and court actions. But they are a likely trap for the inexperienced and unwary inmate, ordinarily

---

* Petitioners and the Solicitor General seek to bolster the analogy by appeal to *Preiser v. Rodriguez*, 411 U.S. 475 (1973), arguing that the Court there recognized that prison administration implicates federal-state comity to the same extent as state criminal proceedings. Pet. Br. 28-29; U.S. Br. 15. But *Preiser* dealt with prison disciplinary proceedings, and what was at stake was whether the inmates were entitled to immediate release. Whether an inmate is entitled to release or can be required to forfeit good-time credits under prison regulations is a question within the expertise of prison administrators; constitutional questions are not. And the issue in *Preiser* was under what conditions federal courts could override the decisions of those administrators. That is, the federal suits in *Preiser* were review proceedings, implicating the states' interest in the integrity of their official decisions and the fact or duration of confinement. Section 1983 suits do not seek to set aside such decisions and cannot affect an inmate's sentence, and for those reasons this Court has treated them differently. See, e.g., *Wilkinson v. Dotson*, 125 S.Ct. 1242 (2005) (distinguishing *Preiser*); *Muhammad v. Close*, 540 U.S. 749 (2004) (same).

indigent and unrepresented by counsel, with a substantial claim."). This is a consequence that the sponsors of the PLRA explicitly disavowed. "Indeed, I do not want to prevent inmates from raising legitimate claims," said Senator Hatch. "This legislation will not prevent those claims from being raised." 141 Cong. Rec. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch); see also 142 Cong. Rec. S2219-03 (daily ed. Mar. 18, 1996) (statement of Sen. Reid) ("If somebody has a good case, a prisoner, let him file it.").

Congress was, of course, concerned about frivolous suits. Other sections of the PLRA specifically target frivolous suits and recreational litigators. 28 U.S.C. § 1915(b) requires even prisoners proceeding in forma pauperis to pay filing fees by installment; § 1915(e)(2) instructs district courts to dismiss frivolous suits sua sponte; § 1915(g) denies in forma pauperis status to inmates, except those in imminent danger of serious physical injury, who have had three actions or appeals dismissed as frivolous, malicious, or failing to state a claim; and 42 U.S.C. § 1997e(e) prohibits suits for mental or emotional injury unaccompanied by physical injury. These provisions do work to filter out frivolous suits and deter the prisoners who file them. As petitioners note, the rate of inmate litigation has dropped dramatically since the enactment of the PLRA. See Pet. Br. 21-22 (noting a "roughly 50 percent decrease" in the filing rate for inmate civil rights suits from 1995 to 2000).

Petitioners go on to suggest that this success "will undoubtedly be reversed" if this Court upholds the decision below. Pet. Br. 22. But the reduction in inmate filings occurred in a legal environment *without* a procedural default rule. The first federal appellate decision to

squarely hold that a procedural error would bar a civil rights suit came in 2002. See *Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002). Before that, federal courts regularly dismissed without prejudice the suits of inmates who had failed to properly exhaust their administrative remedies, stating that the inmates could subsequently exhaust those plainly time-barred remedies and return to court. See, e.g., *Wendell v. Asher*, 162 F.3d 887 (5th Cir. 1998); see generally Roosevelt, *Exhaustion*, 52 Emory L.J. at 1780-1781 (discussing pre-Pozo cases).

What this means is that the PLRA provisions that target frivolous suits and recreational litigators work as intended. Congress did not choose to supplement the precise and selective operation of those provisions with the blunt and counterproductive hammer of a procedural default rule, and no such supplement is needed. The exhaustion requirement simply directs prisoners into the administrative grievance process in the hope that some of the more trivial complaints can be adequately resolved at that stage. It was not intended to operate as a barrier to meritorious claims, and if applied as written, it does not do so. Congress's decision was eminently reasonable, and this Court should respect it.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

KERMIT ROOSEVELT III
Counsel for Amici Curiae
University of Pennsylvania
Law School
3400 Chestnut St.
Philadelphia, PA 19104
215.746.8775

February 1, 2006

No. 05-416

Supreme Court, U.S.
FILED
DEC 29 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JEANNE S. WOODFORD and ANTHONY P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, GEORGIA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA, AND THE VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

ELIOT SPITZER
Attorney General of the State of New York
CAITLIN J. HALLIGAN*
Solicitor General
ROBERT H. EASTON
Deputy Solicitor General
RICHARD DEARING
Assistant Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8016

* *Counsel of Record*

Attorneys for Amicus Curiae State of New York

(Additional Counsel Listed on Signature Page)

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

STATEMENT OF INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. A Procedural Default Rule is Necessary for the PLRA's Exhaustion Requirement to Serve Its Intended Purposes of Reducing the Quantity and Improving the Quality of Prisoner Litigation. 4

II. The PLRA Requires that Inmates Fully Utilize Grievance Procedures, Rather Than Providing a Bare Opportunity for Prison Officials to Address Inmate Complaints 9

III. Precedent Construing Other Exhaustion Requirements Supports the Recognition of a Procedural Default Rule Here 15

A. Exhaustion of Administrative Remedies Generally Requires Compliance With Administrative Filing Deadlines 15

B. This Court's Habeas Corpus Precedents Further Demonstrate the Inseparability of Exhaustion and Procedural Default in the PLRA Context 18

Contents

Page

C. *Oscar Mayer* and *Commercial Office Products* Are Inapposite 20

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

Cases

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 5, 18

Booth v. Churner, 532 U.S. 731 (2001) 5, 7, 10, 18

Brown v. Valoff, 422 F.3d 926 (9th Cir. 2005) 11

Cunningham v. R.R. Retirement Bd., 392 F.3d 567 (3d Cir. 2004) 16

Dretke v. Haley, 541 U.S. 386 (2004) 19

Edwards v. Carpenter, 529 U.S. 446 (2000) 19

EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988) 15, 20, 21

Fay v. Noia, 372 U.S. 391 (1963) 18

Glisson v. U.S. Forest Serv., 55 F.3d 1325 (7th Cir. 1995) 17

Hartsfield v. Vidor, 199 F.3d 305 (6th Cir. 1999) 11

Cited Authorities

Page

Johnson v. Meadows,
418 F.3d 1152 (11th Cir. 2005) 2

Lacy v. Fulbright & Jaworski, Ltd. Liab. P'ship. Long Term Disability Plan,
405 F.3d 254 (5th Cir. 2005) 16

Matter of Patterson v. Smith,
53 N.Y.2d 98 (1981) 14

McCarthy v. Madigan,
503 U.S. 140 (1992) 13, 18

McGee v. United States,
402 U.S. 479 (1971) 17

McKart v. United States,
395 U.S. 185 (1969) 17

Oscar Mayer & Co. v. Evans,
441 U.S. 750 (1979) 15, 20, 21

O'Sullivan v. Boerckel,
526 U.S. 838 (1999) 19

Pineda v. Gonzales,
427 F.3d 833 (10th Cir. 2005) 16

Porter v. Nussle,
534 U.S. 516 (2002) ..... *passim*

Pozo v. McCaughtry,
286 F.3d 1022 (7th Cir. 2002) ..... *passim*

Cited Authorities

Page

Preiser v. Rodriguez,
411 U.S. 475 (1973) 13

Ross v. County of Bernalillo,
365 F.3d 1181 (10th Cir. 2004) 2, 6

Spruill v. Gillis,
372 F.3d 218 (3d Cir. 2004) 2, 7

Thomas v. Woolum,
337 F.3d 720 (6th Cir. 2003) ..... *passim*

Wainwright v. Sykes,
433 U.S. 72 (1977) 18, 19, 20

Williams v. Comstock,
425 F.3d 175 (2d Cir. 2005) 2

Federal Statutes and Regulations

28 U.S.C. § 1915 5

28 U.S.C. § 2254 19

42 U.S.C. § 1983 ..... 5, 20

42 U.S.C. § 1997e ..... *passim*

28 C.F.R. § 542.14 ..... 6, 10

Cited Authorities

Page

State Statutes and Regulations

Cal. Code Regs. tit. 15, § 3084.3 6

Fla. Admin. Code 33-103.011 10

N.Y. Correction Law § 139 12

7 N.Y.C.R.R. § 701.7 ..... 6, 10

Other Authorities

141 Cong. Rec. H14078 (daily ed. Dec. 6, 1995) .. 6

141 Cong. Rec. S7523 (daily ed. May 25, 1995) ... 4, 5

141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) ... 4, 14

Bruce Bernstein, *The Federal Bureau of Prisons Administrative Grievance Procedure: An Effective Alternative to Prisoner Litigation?*, 13 Am. Crim. L. Rev. 779 (1976) 13, 14

Comptroller General of the U.S. Gen. Accounting Office, *Grievance Mechanisms in State Correctional Institutions and Large-City Jails*, App. I (June 17, 1977) 14

Henry M. Hart, Jr., *The Supreme Court, 1958 Term - Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84 (1959) 18, 19

Cited Authorities

Page

Idaho Dep't of Corr., Policy No. 316, § 05.03.00, *available at* http://www.corrections.state.id.us/policy/int316.pdf (last visited Dec. 29, 2005) ... 9

Iowa Dep't of Corr., Policy No. IN-V-46 10

Miss. Dep't of Corr., S.O.P. 20-08-01, l. 213 9

Maine Dep't of Corr., Policy No. 29.1 10

Mont. Dep't of Corr., Policy No. MSP 3.3.3 10

N.Y. Dep't of Corr. Servs., *Inmate Grievance Program Annual Report* (2004) 13

Ohio Dep't of Rehab. & Corr., *CY 2003 Annual Report of the Office of the Chief Inspector* 2004) 13

Webster's New Int'l Dictionary (3d ed. 1981) 16

STATEMENT OF INTEREST OF AMICI CURIAE

The statutory exhaustion requirement at issue in this case mandates exhaustion of administrative remedies in all actions brought by inmates "with respect to prison conditions." Prison Litigation Reform Act of 1995 ("PLRA"), Pub. L. No. 104-134, § 803(d), 110 Stat. 1321-66, 1321-71 (1996) (codified at 42 U.S.C. § 1997e(a)).[1] In enacting the PLRA, which expanded the scope of the exhaustion requirement for suits brought by prisoners and made exhaustion mandatory in such actions, Congress sought to significantly enhance the ability of amici States to use their prison grievance procedures as a tool for safe and effective prison administration, as well as to reduce the number of prisoner lawsuits.

For decades, prison grievance procedures have played an important role in prison administration. Inmate grievances provide timely feedback to state officials about problems that arise in correctional facilities. In individual cases, grievance procedures enable prison administrators to take prompt remedial action that may satisfy the inmate and obviate the need for litigation. From a systemic perspective, such procedures allow prison officials to monitor trends in prisoner complaints before unwise institutional policies or patterns of inappropriate conduct by correctional officers lead to frustration among the inmate population, potentially triggering prisoner unrest or disturbances. Grievance procedures also allow state officials to create factual records of any disputes that may eventually be litigated in court, and to filter out meritless inmate claims, thereby reducing the States' costs of defending against frivolous prisoner litigation.

1. Section 1997e(a) provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

By putting States to the choice of forgoing either full exhaustion or timely filing of inmate grievances, the decision below, if not reversed by this Court, will seriously compromise the efficacy of amici States' prison grievance procedures.

SUMMARY OF ARGUMENT

This case presents the important question of whether an inmate who files an untimely administrative grievance that prison officials properly reject on that ground has nevertheless exhausted his available administrative remedies within the meaning of 42 U.S.C. § 1997e(a). Put another way, the issue is whether the PLRA's exhaustion requirement includes a "procedural default" component.

The United States Courts of Appeals for the Second, Third, Seventh, Tenth, and Eleventh Circuits have concluded that the congressional purposes underlying § 1997e(a) are better served by applying a procedural default rule. *See Williams v. Comstock*, 425 F.3d 175 (2d Cir. 2005); *Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004); *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004); *Johnson v. Meadows*, 418 F.3d 1152, 1159 (11th Cir. 2005). On the other hand, the Sixth Circuit and, in the decision below, the Ninth Circuit have concluded that the timeliness of an inmate's grievance is essentially irrelevant to the PLRA's exhaustion requirement. Pet. App. 1-21; *Thomas v. Woolum*, 337 F.3d 720, 735 (6th Cir. 2003).

While the language of § 1997e(a) does not specifically address the issue, the policies underlying the PLRA's exhaustion requirement unmistakably indicate that failure to timely grieve a dispute should generally constitute a procedural default that bars litigation of that claim. This Court

has explained that an inmate's use of prison grievance procedures helps to "reduce the quantity and improve the quality" of prisoner litigation by filtering out some claims and facilitating the development of a factual record for claims that do wind up in litigation. *Porter v. Nussle*, 534 U.S. 516, 524-525 (2002). Because those benefits are realized only when grievances are considered by prison officials on the merits, Congress intended for the PLRA's exhaustion requirement to create strong incentives for inmates to file timely grievances likely to result in such merits consideration. The Ninth Circuit's rule would nullify these incentives by treating timely and untimely grievances as equally acceptable ways for an inmate to exhaust administrative remedies.

Further, under the Ninth Circuit's cramped reading, the PLRA's exhaustion requirement would have the perverse effect of impairing, rather than enhancing, the utility of prison grievance systems as a tool for prison management. Deadlines are essential to the operation of prison grievance procedures — they facilitate prompt investigation and resolution of grievances, allow for swift remedial responses, and ensure that prison officials receive timely information about prisoner complaints before inmate dissatisfaction leads to unrest. The Ninth Circuit's rule essentially confronts prison officials with two equally bad alternatives: They can either continue to enforce those critical administrative deadlines but forgo a prisoner's exhaustion of administrative remedies prior to filing suit, or, alternatively, routinely consider inmate grievances on the merits regardless of how untimely they may be filed. This Court should confirm that the PLRA does not require this illogical result.

Finally, there is no merit to the Ninth Circuit's contention that applying a procedural default rule would require a court to go beyond the plain text of the PLRA's exhaustion requirement. To the contrary, a party generally must comply

with administrative filing deadlines in order to be deemed to have exhausted his administrative remedies, which is precisely what § 1997e(a) prescribes. Moreover, in the habeas corpus context, this Court has recognized that a procedural default rule is essential to preserve the effectiveness of the exhaustion requirement. The same functional considerations require the recognition of a procedural default rule here.

ARGUMENT

I. A Procedural Default Rule is Necessary for the PLRA's Exhaustion Requirement to Serve Its Intended Purposes of Reducing the Quantity and Improving the Quality of Prisoner Litigation.

As the majority of courts have recognized, *see supra* at 2, the PLRA's exhaustion requirement will be largely rendered toothless unless it is construed to include a procedural default component. The PLRA's core objective is to reduce the burden that prisoner litigation places on the nation's courts. Its enactment was spurred by the "alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners," with inmate filings having risen "from 6,600 in 1975 to more than 39,000 in 1994." 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole). According to bill sponsors, "[f]rivolous lawsuits filed by prisoners tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population." 141 Cong. Rec. S7523, S7524 (daily ed. May 25, 1995) (statement of Sen. Dole); *see also id.* at S7526 (statement of Sen. Kyl) ("[I]nmate suits are clogging the courts and draining precious judicial resources."). By enacting the PLRA, Congress aimed to "help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits." 141 Cong. Rec. S14413, S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch); *see also id.* at S14414 (statement of Sen. Dole) ("If enacted, [the PLRA] would go a long way to take the frivolity out of frivolous inmate litigation.").

"Beyond doubt," Congress meant for the strict, mandatory exhaustion requirement of § 1997e(a) "to reduce the quantity and improve the quality of prisoner suits." *Porter*, 534 U.S. at 524. The exhaustion requirement serves this end by "afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Id.* at 525.

Funneling prisoner complaints into the administrative grievance process has several benefits. First, "corrective action taken [by prison officials] in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation." *Id.*; *accord Booth v. Churner*, 532 U.S. 731, 737 (2001).[2] Second, "internal review might 'filter out some frivolous claims,'" *Porter*, 534 U.S. at 525 (quoting *Booth*, 532 U.S. at 737) — for example, by satisfying the inmate's desire to have his complaint heard, or by offering the inmate a persuasive explanation why the claim is baseless.[3] Third, "for

---

2. Many inmate complaints may have merit if cast as administrative grievances, but nevertheless may be frivolous when framed as a constitutional claim in a 42 U.S.C. § 1983 suit or an action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Directing such complaints into the prison grievance process serves the dual purposes of ensuring that those grievances are first heard in the forum that can most effectively address them and reducing the burden of frivolous prisoner litigation on the courts. 141 Cong. Rec. S7523, S7527 (daily ed. May 25, 1995) (statement of Sen. Kyl) ("Many prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an adequate remedy.").

3. Another PLRA provision, 28 U.S.C. § 1915(g), generally disqualifies from *in forma pauperis* status an inmate who has had three or more lawsuits dismissed "on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." Accordingly, if the administrative review process

(Cont'd)

cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy." *Porter*, 534 U.S. at 525; *see also* 141 Cong. Rec. H14078, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo) (explaining that "new administrative exhaustion language" would "provide some degree of fact-finding so that when or if the matter reaches Federal court there will be a record upon which to proceed in a more efficient manner").

Plainly, for the administrative grievance process to provide these benefits, a grievance filing must result in an investigation and resolution of the grievance by prison officials *on the merits*. As a category, late administrative grievances that are dismissed for untimeliness carry no possibility of (1) triggering corrective action that satisfies the inmate without litigation; (2) filtering out frivolous claims; or (3) developing a factual record that defines and narrows disputed issues in advance of litigation.[4]

Accordingly, the PLRA's exhaustion requirement can succeed in reducing the burden of inmate litigation on

---

(Cont'd)

convinces the inmate that a grievance is likely frivolous, the inmate has good reason not to pursue a lawsuit, because a resulting dismissal may jeopardize his future eligibility for *in forma pauperis* status with regard to other complaints that may have more merit.

4. Some prison grievance procedures provide that prison officials may excuse untimely filings under defined circumstances. *See, e.g.*, 7 N.Y.C.R.R. § 701.7(a)(1) note; 28 C.F.R. § 542.14(b); *see also* Cal. Code Regs. tit. 15, § 3084.3(c)(6) (providing that an administrative appeal "may be rejected" for untimeliness). Where prison officials accept a late filing and address it on the merits, it is appropriate to consider that filing "timely" for the purpose of the PLRA's exhaustion requirement since, in such cases, the goals of exhaustion are fully served. *See Ross*, 365 F.3d at 1186; *Pozo*, 286 F.3d at 1025.

prisoners a strong inducement to skip the administrative process" by fashioning their complaint to seek monetary relief that was unavailable through prison grievance procedures. 532 U.S. at 741. Similarly, in *Porter v. Nussle*, this Court declined to adopt an exception to the exhaustion requirement for prisoner complaints alleging "isolated episodes" of misconduct by corrections officers, thinking it "unlikely that Congress, when it included in the PLRA a firm exhaustion requirement, meant to leave the need to exhaust to the pleader's option." 534 U.S. at 530.

The Ninth Circuit's understanding of the PLRA's exhaustion requirement should be rejected for similar reasons. While the court of appeals disclaimed any intention to excuse an inmate from making at least some attempt at pursuing administrative remedies, its rule nevertheless gives the inmate the option of only nominally doing so through the empty formality of a long-untimely administrative filing — an avenue that is little better than dispensing with the exhaustion requirement in its entirety. The PLRA's exhaustion requirement reflects a clear congressional desire for inmate grievances to be resolved on the merits through administrative processes. The Ninth Circuit's approach undermines that goal, and "leave[s] § 1997e(a) without any oomph." *Pozo*, 286 F.3d at 1025. This Court should reverse the Ninth Circuit to ensure that the PLRA can serve its intended goals.

II. The PLRA Requires that Inmates Fully Utilize Grievance Procedures, Rather Than Providing a Bare Opportunity for Prison Officials to Address Inmate Complaints.

The Ninth Circuit's analysis proceeds from the false premise that the sole purpose of the PLRA's exhaustion requirement is to allow prison officials *some* opportunity to address grievances internally, regardless of whether that opportunity accords with the procedural rules of the prison's grievance resolution system. The court of appeals gave great weight to the fact that California's prison grievance procedures, like those of many other correctional systems, allow prison officials a measure of discretion to excuse untimeliness and reach the merits of a late-filed grievance. Thus, in the Ninth Circuit's view,

> [h]olding that the PLRA does not contain a procedural default bar . . . would in no way obstruct the goal of allowing prison officials first crack at resolving prisoners' grievances. It is for the prison to decide whether to exercise its discretion and accept or refuse the opportunity to hear the case on the merits regardless whether the grievance is timely filed.

Pet. App. 17; *see also Thomas*, 337 F.3d at 726.

While the Ninth Circuit took comfort from the fact that an inmate in California would still be required to file a grievance even if he missed the filing deadline by many months or even longer, Pet. App. 17, not all States provide officials with similar discretion to disregard administrative time limits for inmate filings. In Mississippi, for example, inmates are limited to a total of twenty-five days in extensions at all levels of the administrative process. Miss. Dep't of Corr., S.O.P. 20-08-01, l. 213, at 6 (available on request from the Mississippi Dep't of Corrections). *See also* Idaho Dep't of Corr., Policy No. 316, § 05.03.00, at 3, *available at* http://www.corrections.state.id.us/policy/int316.pdf (last visited Dec. 29, 2005) (permitting the

caseloads nationwide only to the extent that it increases the proportion of inmate complaints that are resolved on the merits through the administrative grievance process. *See Thomas*, 337 F.3d at 738 (Rosen, J., dissenting in part) ("[T]he core purpose of § 1997e(a)'s exhaustion requirement is to ensure that prisoner grievances are resolved administratively to the greatest extent possible."). A procedural default rule is well adapted to that end, since it creates "an overwhelming incentive for a prisoner to pursue his claims to the fullest within the administrative grievance system," *Spruill*, 372 F.3d at 230, and to do so in such a manner that prison officials are likely to address the claims on the merits. By contrast, the Ninth Circuit's holding that even untimely administrative filings can suffice to exhaust remedies all but nullifies the statute's effect on inmates' incentives to file a timely grievance, and, as a consequence, significantly diminishes the provision's effectiveness to direct prisoner complaints into the grievance process for merits consideration. *See Pozo*, 286 F.3d at 1025 (If "prisoners need not file timely complaints and appeals, then the incentive that § 1997e(a) provides for prisoners to use the state process will disappear.").[5]

In its recent PLRA exhaustion decisions, this Court has unanimously turned back inmates' efforts to create exceptions that would allow them to evade the statute's strict exhaustion mandate. Thus, *Booth v. Churner* rejected as "highly implausible" a reading of § 1997e(a) that would "give

5. The Ninth Circuit asserted that "[p]risoners have every incentive to seek administrative review before suing in federal court" because the grievance process "offer[s] prisoners the fastest route to a remedy." Pet. App. 16, 17; *accord Thomas*, 337 F.3d at 732. But that contention merely denies the need for an exhaustion requirement for prisoner suits. Indeed, because Congress found that inmates were underutilizing prison grievance processes, it enacted the PLRA's exhaustion requirement to correct that problem.

initial fifteen-day filing deadline to be extended by a maximum of sixty days). Similarly, Iowa's grievance procedures provide that appeals from adverse decisions "will not be heard" if submitted after the fifteen-day deadline for such filings. Iowa Dep't of Corr., Policy No. IN-V-46, at 5-6 (available on request from the Iowa Department of Corrections).[6]

It is unclear whether the Ninth Circuit's approach would require an inmate to file a grievance even after the lapse of hard deadlines. If so, the rule would reduce the PLRA's exhaustion requirement to a charade. If not, the rule would enable inmates in certain state correctional systems to exhaust their administrative remedies by doing nothing more than waiting until the deadlines pass. Either way, congressional intent would be wholly undermined.

Further, the Ninth Circuit's gloss on the PLRA's exhaustion requirement — that it requires only that prison officials receive some opportunity to address a grievance on the merits — cannot account for core features of the mandate that an inmate "exhaust the grievance procedures offered" at the administrative level. *Booth*, 532 U.S. at 738. For example, case law from both the

6. Those prison grievance systems that vest officials with discretion to excuse untimely filings generally require the prisoner to satisfy a narrowly drawn exception. *See, e.g.*, Fla. Admin. Code 33-103.011(2) (inmate must "clearly demonstrate[]" that "it was not feasible to file the grievance within the relevant time period[]" and that he "made a good faith effort" to file timely); Maine Dep't of Corr., Policy No. 29.1, at 4 (available on request from the Maine Department of Corrections) (exceptions permitted where "it was not possible" for an inmate to meet the deadline); Mont. Dep't of Corr., Policy No. MSP 3.3.3, at 2 (available on request from the Montana Department of Corrections) ("extensions may be granted . . . in exceptional circumstances"); 7 N.Y.C.R.R. § 701.7(a)(1) note (requiring "mitigating circumstances"); 28 C.F.R. § 542.14(b) (inmate must "demonstrate[] a valid reason for delay"). The Ninth Circuit deems an untimely filing to provide prison officials with an adequate "opportunity" to address a complaint if an exception to timeliness is theoretically available, regardless of whether the inmate can make the required showing to support such an exception in his case.

Sixth and Ninth Circuits requires inmates to pursue all levels of available review provided by the prison grievance system. *See, e.g., Hartsfield v. Vidor*, 199 F.3d 305, 309 (6th Cir. 1999); *Brown v. Valoff*, 422 F.3d 926, 934-35 (9th Cir. 2005). It is not enough, therefore, for an inmate to give prison officials an "opportunity" to address his claim at the initial level of review. Rather, the inmate must fully utilize the prison's grievance procedures. It is anomalous, to say the least, to dismiss the claims of an inmate who filed a timely grievance without pursuing all administrative appeals, but to excuse another inmate's long-untimely filing on the ground that prison officials nevertheless had an opportunity to address the inmate's claim if they wished to do so.

Moreover, the "bare opportunity" theory wrongly conceives of the PLRA's exhaustion requirement principally as a "benefit accorded to state prisons." *Thomas*, 337 F.3d at 726. As explained above, § 1997e(a) was meant to be much more than that. Indeed, its primary objective was to alleviate the crushing burden that prisoner litigation was imposing on the nation's courts. The statute furthers that goal by exploiting the ability of existing prison grievance procedures to provide relief that may satisfy an inmate without litigation, to filter out frivolous claims, and to develop a record that may help to define the contours of any litigation. Only administrative grievances that are considered on the merits provide those benefits.

Thus, to conclude that the PLRA's exhaustion requirement has no procedural default component, one must believe that Congress did not aim to strongly encourage inmates to file timely prison grievances, but rather was content to pin the effectiveness of the exhaustion requirement on hopes that prison officials would seize any "opportunity" to consider grievances on the merits, no matter how and when

those grievances were presented. That view is squarely at odds with Congress's clear intent to "invigorate[] the exhaustion prescription" for inmate suits. *Porter*, 534 U.S. at 524; *see also Pozo*, 286 F.3d at 1025 ("Prisons are unlikely to entertain many appeals filed a year late, or by prisoners who otherwise thumb their noses at the specified procedures.").

In addition, that approach "improperly shifts the burden [of the exhaustion requirement] from inmates to prison officials." *Thomas*, 337 F.3d at 742 (Rosen, J., dissenting in part). Indeed, the Ninth Circuit's rule confronts prison officials with the dilemma of either enforcing applicable administrative time frames for inmates to file their grievances, or routinely ignoring such limits in order to allow for untimely grievance filings to yield the benefits of meaningful exhaustion. Choosing the latter course essentially erases the grievance system's deadlines and sacrifices the integrity of the grievance procedures in exchange for the reduction of judicial caseloads.

Administrative time limits are critical to the effectiveness of grievance processes as tools for prison management. No dispute resolution procedure can operate without such deadlines, and strong imperatives of prison management require that the time limits for prison grievance filings and appeals, as well as those for prison officials' decisions on such filings, be rather short. *See, e.g.*, N.Y. Correction Law § 139(2) (requiring the development of procedures "for the fair, simple and expeditious resolution of [inmate] grievances," including "time limitations for the filing of complaints and replies thereto and for each stage of the grievance resolution process").

For example, such deadlines allow the administrative process to capture "the inherent benefit of prompt

investigation, while memories are still fresh and all involved inmates and prison employees remain at the facility." *Thomas*, 337 F.3d at 753 (Rosen, J., dissenting in part). Facilitating effective investigation is essential given the large volume of grievances that prison officials often must process and the quotidian nature of many inmate grievances. *See, e.g.*, N.Y. Dep't of Corr. Servs., *Inmate Grievance Program Annual Report* 2-3 (2004) (showing that inmates in the New York State correctional system filed 44,587 grievances in 2004); Ohio Dep't of Rehab. & Corr., *CY 2003 Annual Report of the Office of the Chief Inspector* 5 (2004) (finding that inmates in Ohio state prisons filed 29,734 informal complaint resolution forms and 6,515 formal grievances in 2003); *see also Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973) (noting that "most potential litigation involving state prisoners arises on a day-to-day basis").

The administrative deadlines of grievance systems also reflect "the desire to bring the entire matter, including all available internal appeals, to a conclusion within a reasonable time period." *Thomas*, 337 F.3d at 753 (Rosen, J., dissenting in part). *Cf. also* Bruce Bernstein, *The Federal Bureau of Prisons Administrative Grievance Procedure: An Effective Alternative to Prisoner Litigation?*, 13 Am. Crim. L. Rev. 779, 786 (1976) ("One of the most important factors in any successful administrative procedure is the speed with which it can attain issue resolution"). That goal assumes added importance when an inmate's lawsuit must await the conclusion of the administrative process. *See McCarthy v. Madigan*, 503 U.S. 140, 147 (1992) (recognizing the "prejudice" that "may result . . . from an unreasonable or indefinite timeframe for administrative action" where exhaustion is required). Further, the time limits enable swift remedial action, which minimizes the adverse consequences of any earlier error and is more likely to satisfy the inmate than a delayed response.

Finally, the deadlines help to ensure that corrections officials receive timely feedback about problems before inmate dissatisfaction with institutional policies or the conduct of prison employees festers and leads to unrest or disturbances among the prison population. Indeed, New York's prison grievance procedures were developed in 1975 in direct response to the Attica uprising in September 1971, in which forty-three persons died. *See Matter of Patterson v. Smith*, 53 N.Y.2d 98, 101 (1981) ("The McKay Commission, appointed to look into the causes of that uprising and make recommendations for change, concluded that a major cause of inmate tension was the lack of a nonviolent means of resolving grievances."); *see also* Bernstein, *supra*, at 779-80 (discussing the relationship between episodes of inmate violence in the 1970s and the development of prisoner grievance procedures).

It is illogical to suppose that Congress meant for the PLRA's exhaustion requirement to interfere with prison officials' enforcement of administrative deadlines and to compromise the effectiveness of prison grievance systems — particularly when federal legislators emphasized their desire to the contrary. *See, e.g.*, 141 Cong. Rec. S14413, S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) ("[I]t is time to . . . return [control of our prisons] to competent administrators").[7] Yet that assumption is exactly what the Ninth Circuit's holding requires, and accordingly, this Court should reverse it.

---

7. The Sixth Circuit expressed concern that recognizing a procedural default rule would spur prison officials to adopt shorter administrative deadlines. *Thomas*, 337 F.3d at 729 n.3. Prison grievance systems, however, are not mere roadblocks to inmate litigation; they serve critical prison management functions. Indeed, such grievance mechanisms largely pre-date any federal exhaustion requirement for prisoner suits. *See* Comptroller General of the U.S. Gen. Accounting Office, *Grievance Mechanisms in State Correctional Institutions and Large-City Jails*, App. I at 5 (June 17, 1977) (reporting in 1977 that forty-three States had grievance

(Cont'd)

III. Precedent Construing Other Exhaustion Requirements Supports the Recognition of a Procedural Default Rule Here.

A procedural default rule is not only necessary to serve the PLRA's purposes, but comports with exhaustion requirements in other areas of the law. In administrative law, for example, a party generally must comply with filing deadlines in order to exhaust his remedies. In the habeas corpus context, too, this Court has recognized that a procedural default rule is essential for the exhaustion requirement to be effective. Both of these models of exhaustion support the application of a procedural default rule under the PLRA. By contrast, the Ninth Circuit's examples of regimes without a procedural default rule for untimely filings, those addressed in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), and *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988), involve statutes that do not mandate the exhaustion of remedies and have no relevance here.

A. Exhaustion of Administrative Remedies Generally Requires Compliance With Administrative Filing Deadlines.

Section 1997e(a) bars inmates from suing "until such administrative remedies as are available are exhausted." Respondent claims that a procedural default rule would require more than simple exhaustion of remedies, and that there is no foundation in the PLRA's text for such a rule. Cert. Opp. 10. The Ninth Circuit agreed, holding that an

---

(Cont'd)

mechanisms in place and four additional States planned to implement such procedures). Prison officials have a vital interest in ensuring that the grievance process is effective in addressing inmate complaints — an interest that provides a substantial check against the development of unreasonable procedures.

inmate has exhausted administrative remedies when no further remedies "remain available" to him, regardless of whether the inmate fully and properly pursued those remedies. Pet. App. 10; *see also* Cert. Opp. 11 n.1 (an exhaustion requirement is "satisfied once no further state remedies are available"). Along similar lines, the Sixth Circuit has held that § 1997e(a) establishes only a "termination requirement, designed to keep federal courts out as long as the state administrative machinery is working to resolve the problem." *Thomas*, 337 F.3d at 730. Under this view, to read the PLRA to require timely administrative filings is to impose additional "procedural hurdles" beyond mere "exhaustion." Cert. Opp. 10; *see also Thomas*, 337 F.3d at 731 (describing procedural default as "an additional requirement added on top of exhaustion").

In fact, however, a procedural default rule fits comfortably under the rubric of "exhaustion of remedies." Generally, that term means not only that the administrative process is concluded, but also that the party bound to exhaust fully utilized the process that was available to him. *See, e.g.*, *Webster's New Int'l Dictionary* 796 (3d ed. 1981) (defining "exhaust" as "to take complete advantage of (legal remedies)"). Thus, as the Seventh Circuit observed in *Pozo*, in administrative law "exhaustion means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits)." *Pozo*, 286 F.3d at 1024; *see also Pineda v. Gonzales*, 427 F.3d 833, 838 (10th Cir. 2005) ("We have recognized in a variety of contexts that untimely filings with administrative agencies do not constitute exhaustion of administrative remedies."); *Lacy v. Fulbright & Jaworski, Ltd. Liab. P'ship. Long Term Disability Plan*, 405 F.3d 254, 255 (5th Cir. 2005) (equating "failure to file a timely [administrative] appeal" and "failure to exhaust administrative remedies"); *Cunningham v. R.R. Retirement Bd.*, 392 F.3d 567, 572 (3d Cir. 2004) (noting

development of the habeas exhaustion rule as an abstention principle).[10] Yet this Court applies a procedural default rule in federal habeas cases as well. *See, e.g., Wainwright*, 433 U.S. at 81. While the procedural default doctrine had its early roots in the "adequate and independent state ground" doctrine, and although it may technically be distinct from the federal habeas statute's exhaustion requirement, the exhaustion and procedural default doctrines are tightly yoked functionally, as this Court has repeatedly recognized.

Indeed, this Court has observed that a procedural default rule is necessary "to protect the integrity of" the federal habeas exhaustion requirement. *O'Sullivan v. Boerckel*, 526 U.S. 838, 853 (1999); *accord Dretke v. Haley*, 541 U.S. 386, 392 (2004) (describing the procedural default doctrine as a "corollary to the habeas statute's exhaustion requirement"). This Court has further described the two doctrines as "inseparab[le]," remarking that without a procedural default rule, the exhaustion requirement would be "render[ed] . . . illusory." *Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000).

As discussed *supra* at 4-8, a procedural default rule is likewise essential to preserving the effectiveness of the PLRA's exhaustion requirement. The Ninth Circuit rejected the habeas analogy because the relationship between prison

---

10. Section 2254(b) of title 28 of the United States Code codifies the habeas exhaustion principle and bars a federal court from granting habeas relief "unless . . . the applicant has exhausted the remedies available in the courts of the State." The statute makes clear that a remedy is considered "available" only if the doors of state court remain open to the applicant at the time a petition is filed, providing that "[a]n applicant shall not be deemed to have exhausted his remedies . . . if he has the right to raise, by any available procedure, the question presented." *See also* Hart, *supra*, at 113 n.87 (parsing the text of § 2254).

that plaintiff did not "exhaust[] her administrative remedies . . . because she failed to timely appeal" an adverse decision); *Glisson v. U.S. Forest Serv.*, 55 F.3d 1325 (7th Cir. 1995) (holding that plaintiff who filed an untimely administrative appeal did not exhaust his remedies).

This Court has explained that the full benefits of exhaustion are not attained merely because "the administrative process is at an end" and thus can no longer afford relief to the claimant. *McKart v. United States*, 395 U.S. 185, 194 (1969). Indeed, important "justifications for requiring exhaustion . . . have nothing to do with the dangers of interruption of the administrative process." *Id.* at 194-95. These include "practical notions of judicial efficiency": If a complaining party is affirmatively "required to pursue his administrative remedies, the courts may never have to intervene." *Id.* at 195; *see also McGee v. United States*, 402 U.S. 479, 483 (1971) (noting that an exhaustion requirement bars suit by one who has "failed to pursue normal administrative remedies and thus has sidestepped a corrective process which might have cured or rendered moot the very defect later complained of in court"). In addition, where a party fails to utilize the administrative process fully, "judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record." *McKart*, 395 U.S. at 194.

The PLRA's exhaustion requirement is animated by just such considerations. Its "dominant concern" is "to promote administrative redress, filter out groundless claims, and foster better prepared litigation of claims aired in court." *Porter*, 534 U.S. at 528. Those ends are not served merely by postponing suit until the administrative process can no longer provide a remedy; rather, inmates must be required to fully exploit the prison grievance system to allow prison officials an opportunity to render a decision on the merits of any

grievance procedures and § 1983 suits is unlike that between state criminal proceedings and federal habeas proceedings, where the procedural default doctrine is needed to ensure that "the state criminal process" is "the 'main event' rather than a 'tryout on the road' to a dispositive federal habeas hearing." Pet. App. 14 (quoting *Wainwright*, 433 U.S. at 90). But even if that precise rationale may not apply here, other powerful considerations support the recognition of a procedural default rule under the PLRA.

In particular, such a rule forces inmates to lodge complaints with prison officials in such a manner as will maximize the likelihood that such grievances will be resolved on the merits. Without a procedural default rule, the PLRA's exhaustion requirement creates no incentive for inmates to use the administrative process in a meaningful way. The Ninth Circuit's ruling, therefore, would effectively return matters to their pre-PLRA state, with federal litigation occupying the primary role in addressing all manner of prisoner complaints. Congress enacted the PLRA precisely to change that situation.

C. *Oscar Mayer* and *Commercial Office Products* Are Inapposite.

Perhaps the nearest precedents for the Ninth Circuit's rule are *Oscar Mayer Co. v. Evans*, 441 U.S. 750 (1979), and *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988), which construed nearly identical sections of the Age Discrimination in Employment Act ("ADEA") and Title VII, respectively. Pet. App. 18; *see also Thomas*, 337 F.3d at 727. In *Oscar Mayer* and *Commercial Office Products*, this Court held that statutory provisions precluding the filing of a federal lawsuit until sixty days after a complainant "commenced" state administrative proceedings required a complainant to initiate state administrative proceedings as a precondition to

formal inmate complaint.[8] *See supra* at 4-8. A procedural default rule is therefore necessary to implement the PLRA in accordance with its intended purposes.[9]

B. This Court's Habeas Corpus Precedents Further Demonstrate the Inseparability of Exhaustion and Procedural Default in the PLRA Context.

Respondent argued, and the Ninth Circuit agreed, that exhaustion as required by the PLRA should be strictly defined in the same manner as it is in the federal habeas corpus context. Pet. App. 10. It is true that the federal habeas exhaustion requirement, taken alone, mandates only that a petitioner have no remaining state remedies "available" when a habeas petition is filed. *See Fay v. Noia*, 372 U.S. 391, 434-36 (1963), *overruled on other grounds by Wainwright v. Sykes*, 433 U.S. 72 (1977); Henry M. Hart, Jr., *The Supreme Court, 1958 Term - Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 113 (1959) (discussing the early

8. The Ninth Circuit noted that § 1997e(a) precludes suit "until" an inmate exhausts administrative remedies, which in its view suggests a mere rule of timing. As shown above, however, the goals of § 1997e(a), as framed by this Court, go well beyond timing considerations. That being so, the provision's use of the word "until" is far too slender a reed to support the Ninth Circuit's holding.

9. Before the PLRA's enactment, this Court declined to create by judicial decision an exhaustion requirement for *Bivens* actions brought by federal inmates. *See McCarthy*, 503 U.S. at 152. In concluding that the costs of such an exhaustion requirement would outweigh its benefits, this Court treated a procedural default rule as part and parcel of requiring exhaustion. *Id.* (noting that an exhaustion requirement would create a "risk of forfeiture" by inmates' failures to meet administrative filing deadlines). By enacting the PLRA, Congress overruled *McCarthy*, leading this Court to observe that Congress "may well have thought" the *McCarthy* analysis "shortsighted" in discounting the benefits of exhaustion. *Booth*, 532 U.S. at 737.

federal suit, but did not require compliance with state administrative filing deadlines. Those *sui generis* provisions differ from the PLRA's exhaustion requirement in nearly every material respect, however, and *Oscar Mayer* and *Commercial Office Products* therefore provide no guidance in construing § 1997e(a).

To begin with, those cases did not involve an exhaustion requirement.[11] The statutes at issue there obligate a complainant only to "commence" state administrative proceedings before filing a federal suit, not to exhaust state administrative remedies. This Court noted that the word "commence" itself "strongly implies . . . that state limitations periods are irrelevant," since generally "even a time-barred action may be 'commenced' by the filing of a complaint." *Oscar Mayer*, 441 U.S. at 759 (reasoning by analogy to Fed. R. Civ. P. 3). The ADEA and Title VII make "th[at] implication . . . express" by deeming a state administrative proceeding "commenced" for the purpose of federal law when the complainant mails a written, signed statement of facts to the state authority, regardless of whether state law purports to impose any additional requirement, such as timeliness, as a precondition to commencement. *Oscar Mayer*, 441 U.S. at 760. The text of § 1997e(a), however, is very different: the word "exhaust," in contrast to "commence," generally connotes full utilization of the administrative processes offered, including timely filings at all levels of review. In the PLRA, moreover, Congress did not override the procedural rules of the nation's diverse prison grievance systems with a uniform federal standard.

---

11. Even though neither *Oscar Mayer* nor *Commercial Office Products* involved an exhaustion requirement, the Ninth Circuit cited those cases for the proposition that "administrative exhaustion does not include a procedural default component." Pet. App. 18. As discussed *supra* at 16-18, administrative exhaustion typically does encompass the concept of procedural default.

Equally importantly, the statutory purposes of the ADEA and Title VII are fully served without requiring compliance with state administrative deadlines. On that point, this Court stressed that the statutes "do[] not stipulate an exhaustion requirement," *Oscar Mayer*, 441 U.S. at 761, but aim more modestly to give "state agencies a *limited* opportunity" to resolve complaints before federal authorities intervene, *id.* (emphasis added). The statutory provisions themselves reflect that minimal comity concern, mandating only that the complainant wait sixty days after giving state authorities notice of the claim before filing a federal suit, regardless of whether the state authorities have taken any action by that time.

By contrast, the PLRA's objectives are far broader. Congress manifestly "stipulated" the exhaustion (not just commencement) of prison grievance processes, and did so for the express purposes of alleviating docket congestion from prisoner lawsuits and improving the quality of those suits that do end up in court. As discussed above, those goals require more than a "limited opportunity" for administrative action. They require merits consideration of inmate grievances at the administrative level, which can be ensured only by timely administrative filings.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

ELIOT SPITZER
Attorney General of the State of New York
CAITLIN J. HALLIGAN*
Solicitor General
ROBERT H. EASTON
Deputy Solicitor General
RICHARD DEARING
Assistant Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8016

Attorneys for Amicus Curiae State of New York

* *Counsel of Record*

TROY KING
Attorney General
State of Alabama
11 South Union Street
Montgomery, AL 36106

TERRY GODDARD
Attorney General
State of Arizona
1275 West Washington
Phoenix, AZ 85007

MIKE BEEBE
Attorney General
State of Arkansas
323 Center Street
Little Rock, AR 72201

JOHN W. SUTHERS
Attorney General
State of Colorado
1525 Sherman Street
7th Floor
Denver, CO 80203

CARL C. DANBERG
Attorney General
State of Delaware
820 N. French Street
Wilmington, DE 19801

THURBERT E. BAKER
Attorney General
State of Georgia
Department of Law
40 Capitol Square Southwest
Atlanta, GA 30334

MARK J. BENNETT
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

LAWRENCE G. WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720

LISA MADIGAN
Attorney General
State of Illinois
100 West Randolph Street
12th Floor
Chicago, IL 60601

THOMAS J. MILLER
Attorney General
State of Iowa
Hoover Building
Second Floor
Des Moines, IA 50319

PHILL KLINE
Attorney General
State of Kansas
120 S.W. 10th Avenue
Topeka, KS 66612

THOMAS F. REILLY
Attorney General
Commonwealth
of Massachusetts
One Ashburton Place
Boston, MA 02108

MICHAEL A. COX
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

MIKE MCGRATH
Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620-1401

JOHN BRUNING
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

GEORGE J. CHANOS
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

WAYNE STENEHJEM
Attorney General
State of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505

JIM PETRO
Attorney General
State of Ohio
30 E. Broad Street
17th Floor
Columbus, OH 43215

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma
2300 N. Lincoln Boulevard
Suite 112
Oklahoma City, OK 73105

HARDY MYERS
Attorney General
State of Oregon
1162 Court Street N.E.
Salem, OR 97301

THOMAS W. CORBETT, JR.
Attorney General
Commonwealth
of Pennsylvania
Strawberry Square
16th Floor
Harrisburg, PA 17120

HENRY MCMASTER
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, SC 29211

GREG ABBOTT
Attorney General
State of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711

MARK L. SHURTLEFF
Attorney General
State of Utah
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114

WILLIAM H. SORRELL
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

JUDITH WILLIAMS JAGDMANN
Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219

ROB MCKENNA
Attorney General
State of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504

ROBERT J. SPAGNOLETTI
Attorney General
The District of Columbia
John A. Wilson Building
1350 Pennsylvania Ave. NW
Suite 409
Washington DC 20004

KERRY E. DRUE
Attorney General
The Virgin Islands
34-38 Krondprindsens Gade
GERS Complex, 2d Floor
St. Thomas,
Virgin Islands 00802

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WOODFORD ET AL. *v.* NGO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05–416. Argued March 22, 2006—Decided June 22, 2006

The Prison Litigation Reform Act of 1995 (PLRA) requires a prisoner to exhaust any available administrative remedies before challenging prison conditions in federal court. 42 U. S. C. §1997e(a). Respondent filed a grievance with California prison officials about his prison conditions, but it was rejected as untimely under state law. He subsequently sued petitioner officials under §1983 in the Federal District Court, which granted petitioners' motion to dismiss on the ground that respondent had not fully exhausted his administrative remedies under §1997e(a). Reversing, the Ninth Circuit held that respondent had exhausted those remedies because none remained available to him.

Held: The PLRA's exhaustion requirement requires proper exhaustion of administrative remedies. Pp. 5–21.

(a) Petitioners claim that a prisoner must complete the administrative review process in accordance with applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court, but respondent contends that §1997e(a) allows suit once administrative remedies are no longer available, regardless of the reason. To determine the correct interpretation, the Court looks for guidance to both administrative and habeas corpus law, where exhaustion is an important doctrine. Administrative law requires proper exhaustion of administrative remedies, which "means using all steps that the agency holds out, and doing so *properly*." *Pozo* v. *McCaughtry*, 286 F. 3d 1022, 1024. Habeas law has substantively similar rules, though its terminology is different. Pp. 5–11.

(b) Given this background, the Court is persuaded that the PLRA requires proper exhaustion. Pp. 11–17.

(1) By referring to "such administrative remedies as are avail-

Syllabus

able," §1997e(a)'s text strongly suggests "exhausted" means what it means in administrative law. P. 11.

(2) Construing §1997e(a) to require proper exhaustion also serves the PLRA's goals. It gives prisoners an effective incentive to make full use of the prison grievance process, thus providing prisons with a fair opportunity to correct their own errors. It reduces the quantity of prisoner suits. And it improves the quality of those suits that are filed because proper exhaustion often results in creation of an administrative record helpful to the court. In contrast, respondent's interpretation would make the PLRA's exhaustion scheme totally ineffective, since exhaustion's benefits can be realized only if the prison grievance system is given a fair opportunity to consider the grievance. That cannot happen unless the grievant complies with the system's critical procedural rules. Respondent's arguments that his interpretation would filter out frivolous claims are unpersuasive. Pp. 11–14.

(3) As interpreted by respondent, the PLRA exhaustion requirement would be unprecedented. No statute or case purports to require exhaustion while at the same time allowing a party to bypass deliberately the administrative process by flouting the agency's procedural rules. None of his models is apt. He first suggests that the PLRA requirement was patterned on habeas law as it existed between 1963 and 1977 when, under *Fay* v. *Noia*, 372 U. S. 391, 438, a federal habeas claim could be procedurally defaulted only if the prisoner deliberately bypassed state remedies. That would be fanciful, however. The PLRA was enacted contemporaneously with the Antiterrorism and Effective Death Penalty Act of 1996, which gave federal habeas review a structure markedly different from what existed before 1977. Furthermore, respondent's interpretation would not duplicate that scheme, for it would permit a prisoner to bypass deliberately administrative review with no risk of sanction. Respondent next suggests that the PLRA exhaustion requirement is patterned on §14(b) of the Age Discrimination in Employment Act of 1967 and §706(e) of Title VII of the Civil Rights Act of 1964, but neither provision is in any sense an exhaustion provision. Pp. 14–17.

(c) Respondent's remaining arguments regarding §1997e(a)'s interpretation are also unconvincing. Pp. 17–21.

403 F. 3d 620, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–416

JEANNE S. WOODFORD, ET AL., PETITIONERS *v.* VIET MIKE NGO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 2006]

JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether a prisoner can satisfy the Prison Litigation Reform Act's exhaustion requirement, 42 U. S. C. §1997e(a), by filing an untimely or otherwise procedurally defective administrative grievance or appeal. We hold that proper exhaustion of administrative remedies is necessary.

I

A

Congress enacted the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321–71, as amended, 42 U. S. C. §1997e *et seq.*, in 1996 in the wake of a sharp rise in prisoner litigation in the federal courts, see, *e.g.*, *Alexander* v. *Hawk*, 159 F. 3d 1321, 1324–1325 (CA11 1998) (citing statistics). The PLRA contains a variety of provisions designed to bring this litigation under control. See, *e.g.*, §1997e(c) (requiring district courts to weed out prisoner claims that clearly lack merit); §1997e(e) (prohibiting claims for emotional injury without prior showing of physical injury); §1997e(d) (restricting attorney's fees).

A centerpiece of the PLRA's effort "to reduce the quan-

tity . . . of prisoner suits" is an "invigorated" exhaustion provision, §1997e(a). *Porter* v. *Nussle*, 534 U. S. 516, 524 (2002). Before 1980, prisoners asserting constitutional claims had no obligation to exhaust administrative remedies. See *Wilwording* v. *Swenson*, 404 U. S. 249, 251 (1971) *(per curiam)*. In the Civil Rights of Institutionalized Persons Act, §7, 94 Stat. 349, Congress enacted a weak exhaustion provision, which authorized district courts to stay actions under Rev. Stat. §1979, 42 U. S. C. §1983 for a limited time while a prisoner exhausted "such plain, speedy, and effective administrative remedies as are available." §1997e(a)(1) (1994 ed.). "Exhaustion under the 1980 prescription was in large part discretionary; it could be ordered only if the State's prison grievance system met specified federal standards, and even then, only if, in the particular case, the court believed the requirement 'appropriate and in the interests of justice.'" *Nussle*, *supra*, at 523 (quoting §1997e). In addition, this provision did not require exhaustion if the prisoner sought only money damages and such relief was not available under the relevant administrative scheme. See *McCarthy* v. *Madigan*, 503 U. S. 140, 150–151 (1992).

The PLRA strengthened this exhaustion provision in several ways. Exhaustion is no longer left to the discretion of the district court, but is mandatory. See *Booth* v. *Churner*, 532 U. S. 731, 739 (2001). Prisoners must now exhaust all "available" remedies, not just those that meet federal standards. Indeed, as we held in *Booth*, a prisoner must now exhaust administrative remedies even where the relief sought—monetary damages—cannot be granted by the administrative process. *Id.*, at 734. Finally, exhaustion of available administrative remedies is required for any suit challenging prison conditions, not just for suits under §1983. *Nussle*, *supra*, at 524.

B

California has a grievance system for prisoners who seek to challenge their conditions of confinement. To initiate the process, an inmate must fill out a simple form, Dept. of Corrections, Inmate/Parolee Appeal Form, CDC 602 (12/87) (hereinafter Form 602), that is made "readily available to all inmates." Cal. Code Regs., tit. 15, §3084.1(c) (2004). The inmate must fill out two parts of the form: part A, which is labeled "Describe Problem," and part B, which is labeled "Action Requested." Then, as explained on Form 602 itself, the prisoner "must first informally seek relief through discussion with the appropriate staff member." App. 40–41. The staff member fills in part C of Form 602 under the heading "Staff Response" and then returns the form to the inmate.

If the prisoner is dissatisfied with the result of the informal review, or if informal review is waived by the State, the inmate may pursue a three-step review process. See §§3084.5(b)–(d). Although California labels this "formal" review (apparently to distinguish this process from the prior step), the three-step process is relatively simple. At the first level, the prisoner must fill in part D of Form 602, which states: "If you are dissatisfied, explain below." *Id.*, at 40. The inmate then must submit the form, together with a few other documents, to the Appeals Coordinator within 15 working days—three weeks—of the action taken. §3084.6(c). This level may be bypassed by the Appeals Coordinator in certain circumstances. §3084.5(b). Within 15 working days after an inmate submits an appeal, the reviewer must inform the inmate of the outcome by completing part E of Form 602 and returning the form to the inmate.

If the prisoner receives an adverse determination at this first level, or if this level is bypassed, the inmate may proceed to the second level of review conducted by the warden. §§3084.5(c), (e)(1). The inmate does this by

filling in part F of Form 602 and submitting the form within 15 working days of the prior decision. Within 10 working days thereafter, the reviewer provides a decision on a letter that is attached to the form. If the prisoner's claim is again denied or the prisoner otherwise is dissatisfied with the result, the prisoner must explain the basis for his or her dissatisfaction on part H of the form and mail the form to the Director of the California Department of Corrections and Rehabilitation within 15 working days. §3084.5(e)(2). An inmate's appeal may be rejected where "[t]ime limits for submitting the appeal are exceeded and the appellant had the opportunity to file within the prescribed time constraints." §3084.3(c)(6).

C

Respondent is a prisoner who was convicted for murder and is serving a life sentence in the California prison system. In October 2000, respondent was placed in administrative segregation for allegedly engaging in "inappropriate activity" in the prison chapel. Two months later, respondent was returned to the general population, but respondent claims that he was prohibited from participating in "special programs," including a variety of religious activities. Approximately six months after that restriction was imposed, respondent filed a grievance with prison officials challenging that action. That grievance was rejected as untimely because it was not filed within 15 working days of the action being challenged. See §§3084.3(c)(6), 3084.6(c).

Respondent appealed that decision internally without success, and subsequently sued petitioners—California correctional officials—under 42 U. S. C. §1983 in Federal District Court. The District Court granted petitioners' motion to dismiss because respondent had not fully exhausted his administrative remedies as required by §1997e(a). See App. to Pet. for Cert. 24–25.

The Court of Appeals for the Ninth Circuit reversed and held that respondent had exhausted administrative remedies simply because no such remedies remained available to him. 403 F. 3d 620, 629–630 (2005). The Ninth Circuit's decision, while consistent with the decision of a divided panel of the Sixth Circuit in *Thomas* v. *Woolum*, 337 F. 3d 720 (2003), conflicts with decisions of four other Courts of Appeals. See *Pozo* v. *McCaughtry*, 286 F. 3d 1022, 1025 (CA7) ("To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require"), cert. denied, 537 U. S. 949 (2002); *Ross* v. *County of Bernalillo*, 365 F. 3d 1181, 1185–1186 (CA10 2004) (same); *Spruill* v. *Gillis*, 372 F. 3d 218, 230 (CA3 2004) (same); *Johnson* v. *Meadows*, 418 F. 3d 1152, 1159 (CA11 2005) (same). We granted certiorari to address this conflict, 546 U. S. ___ (2005), and we now reverse.

II

A

The PLRA provides as follows:

> "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility *until such administrative remedies as are available are exhausted*." §1997e(a) (2000 ed.) (emphasis added).

There is no dispute that this language requires a prisoner to "exhaust" administrative remedies, but the parties differ sharply in their understanding of the meaning of this requirement. Petitioners argue that this provision requires proper exhaustion. This means, according to petitioners, that a prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to

bringing suit in federal court. Respondent, on the other hand, argues that this provision demands what he terms "exhaustion *simpliciter*." Brief for Respondent 7. In his view, §1997e(a) simply means that a prisoner may not bring suit in federal court until administrative remedies are no longer available. Under this interpretation, the reason why administrative remedies are no longer available is irrelevant. Bare unavailability suffices even if this results from a prisoner's deliberate strategy of refraining from filing a timely grievance so that the litigation of the prisoner's claim can begin in federal court.

The key for determining which of these interpretations of §1997e(a) is correct lies in the term of art "exhausted." Exhaustion is an important doctrine in both administrative and habeas law, and we therefore look to those bodies of law for guidance.

B

"The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law." *McKart* v. *United States*, 395 U. S. 185, 193 (1969). "The doctrine provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Ibid.* (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51 (1938)). Exhaustion of administrative remedies serves two main purposes. See *McCarthy*, 503 U. S., at 145.

First, exhaustion protects "administrative agency authority." *Ibid.* Exhaustion gives an agency "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court," and it discourages "disregard of [the agency's] procedures." *Ibid.*

Second, exhaustion promotes efficiency. *Ibid.* Claims generally can be resolved much more quickly and eco-

nomically in proceedings before an agency than in litigation in federal court. In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in federal court. See *ibid.*; *Parisi* v. *Davidson*, 405 U. S. 34, 37 (1972); *McKart*, *supra*, at 195. "And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." *McCarthy*, *supra*, at 145.

Because of the advantages of administrative review, some aggrieved parties will voluntarily exhaust all avenues of administrative review before resorting to federal court, and for these parties an exhaustion requirement is obviously unnecessary. Statutes requiring exhaustion serve a purpose when a significant number of aggrieved parties, if given the choice, would not voluntarily exhaust. Aggrieved parties may prefer not to exhaust administrative remedies for a variety of reasons. Although exhaustion promotes overall efficiency, a party may conclude—correctly or incorrectly—that exhaustion is not efficient in that party's particular case. In addition, some aggrieved parties may prefer to proceed directly to federal court for other reasons, including bad faith.[1] See *Thomas*, *supra*, at 752–753 (Rosen, J., dissenting in part and concurring in judgment).

Because exhaustion requirements are designed to deal with parties who do not want to exhaust, administrative law creates an incentive for these parties to do what they would otherwise prefer not to do, namely, to give the agency a fair and full opportunity to adjudicate their

---

[1] One can conceive of an inmate's seeking to avoid creating an administrative record with someone that he or she views as a hostile fact-finder, filing a lawsuit primarily as a method of making some corrections official's life difficult, or perhaps even speculating that a suit will mean a welcome—if temporary—respite from his or her cell.

claims. Administrative law does this by requiring proper exhaustion of administrative remedies, which "means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)." *Pozo*, 286 F. 3d, at 1024 (emphasis in original). This Court has described the doctrine as follows: "[A]s a general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice*." *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 37 (1952) (emphasis added). See also *Sims* v. *Apfel*, 530 U. S. 103, 108 (2000); *id.*, at 112 (O'Connor, J., concurring in part and concurring in judgment) ("On this underlying principle of administrative law, the Court is unanimous"); *id.*, at 114–115 (BREYER, J., dissenting); *Unemployment Compensation Comm'n of Alaska* v. *Aragon*, 329 U. S. 143, 155 (1946); *Hormel* v. *Helvering*, 312 U. S. 552, 556–557 (1941); 2 K. Davis & R. Pierce, Administrative Law Treatise §15:8, pp. 341–344 (3d ed. 1994). Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.[2]

---

[2]The dissent makes two chief arguments regarding the doctrine of exhaustion in administrative law. Neither is sound.

First, the dissent contends that, "in the absence of explicit statutory directive," proper exhaustion is required only in proceedings that are in the nature of "appellate review proceedings." *Post*, at 9 (opinion of STEVENS, J.). The only authorities cited in support of this proposition are *Sims* v. *Apfel*, 530 U. S. 103, 108–109 (2000)—which concerns different questions, *i.e.*, issue exhaustion and the distinction between adversarial and non-adversarial proceedings—and an *amici* brief, which in turns cites no supporting authority. See *post*, at 9 (citing Brief for Law Professors 1). The *amici* brief argues that "[t]he conceptual key to this case is [the] distinction" between an "original proceeding," in which "the court is simply determining the legality of out-of-court action," and a

C

The law of habeas corpus has rules that are substantively similar to those described above. The habeas statute generally requires a state prisoner to exhaust state remedies before filing a habeas petition in federal court. See 28 U. S. C. §§2254(b)(1), (c). "This rule of comity reduces friction between the state and federal court systems by avoiding the 'unseem[liness]' of a federal district court's overturning a state-court conviction without the state courts having had an opportunity to correct the

---

"review proceeding," in which the court must "review the decision of some other adjudicator." *Id.*, at 2–3. According to the *amici* brief, habeas petitions are prime examples of "review proceeding[s]" because they "ask federal courts to review the decisions of state courts." *Id.*, at 3. This argument is deeply flawed.

"[H]abeas corpus [is] an original . . . civil remedy for the enforcement of the right to personal liberty, rather than . . . a stage of the state criminal proceedings . . . or as an appeal therefrom." *Fay* v. *Noia*, 372 U. S. 391, 423–424 (1963) (footnote omitted). And habeas law includes the "judge-made doctrine of procedural default." *Post*, at 5, n. 4. This shows that the dissent and the *amici* brief are incorrect in contending that a proper exhaustion requirement is incompatible with an original proceeding.

Second, the dissent argues that, even if administrative law generally requires proper exhaustion, respondent falls within an exception to that rule. *Post*, at 11. As the dissent puts it, "[b]ecause respondent has raised constitutional claims, . . . the Court may not, as a matter of federal common law, apply an extrastatutory waiver requirement against him." *Ibid.* But we are not applying an "extrastatutory" requirement "as a matter of federal common law." *Ibid.* We are interpreting and applying the statutory requirement set out in the PLRA exhaustion provision. We interpret the PLRA exhaustion provision to require proper exhaustion, not the unprecedented scheme of exhaustion *simpliciter* that the respondent advocates. As for the suggestion that the PLRA might be meant to require proper exhaustion of nonconstitutional claims but not constitutional claims, we fail to see how such a carve-out would serve Congress' purpose of addressing a flood of prisoner litigation in the federal courts, see *supra*, at 1, when the overwhelming majority of prisoner civil rights and prison condition suits are based on the Constitution.

constitutional violation in the first instance." *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 845 (1999) (alteration in original). A state prisoner is generally barred from obtaining federal habeas relief unless the prisoner has properly presented his or her claims through one "complete round of the State's established appellate review process." *Ibid.* In practical terms, the law of habeas, like administrative law, requires proper exhaustion, and we have described this feature of habeas law as follows: "To . . . 'protect the integrity' of the federal exhaustion rule, we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies . . . ." *Id.*, at 848 (citation omitted; emphasis in original).

The law of habeas, however, uses terminology that differs from that of administrative law. In habeas, the sanction for failing to exhaust properly (preclusion of review in federal court) is given the separate name of procedural default, although the habeas doctrines of exhaustion and procedural default "are similar in purpose and design and implicate similar concerns," *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 7 (1992). See also *Coleman* v. *Thompson*, 501 U. S. 722, 731–732 (1991). In habeas, state-court remedies are described as having been "exhausted" when they are no longer available, regardless of the reason for their unavailability. See *Gray* v. *Netherland*, 518 U. S. 152, 161 (1996). Thus, if state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or for taking an appeal, those remedies are technically exhausted, *ibid.*, but exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court. Instead, if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding. *Id.*, at 162; *Coleman*, *supra*, at 744–751.

III

With this background in mind, we are persuaded that the PLRA exhaustion requirement requires proper exhaustion.

A

The text of 42 U. S. C. §1997e(a) strongly suggests that the PLRA uses the term "exhausted" to mean what the term means in administrative law, where exhaustion means proper exhaustion. Section 1997e(a) refers to "such administrative remedies as are available," and thus points to the doctrine of exhaustion in administrative law.

B

Construing §1997e(a) to require proper exhaustion also fits with the general scheme of the PLRA, whereas respondent's interpretation would turn that provision into a largely useless appendage. The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons,[3] and thus seeks to "affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Nussle*, 534 U. S., at 525. See also *Booth*, 532 U. S., at 739. The PLRA also was intended to "reduce the quantity and improve the quality of prisoner suits." *Nussle*, *supra*, at 524.

Requiring proper exhaustion serves all of these goals. It gives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors. This is particularly important in relation to state corrections systems because it is "difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations,

---

[3]See, *e.g.*, 18 U. S. C. §3626(b)(2) (termination of prison-conditions consent decrees).

and procedures, than the administration of its prisons." *Preiser* v. *Rodriguez*, 411 U. S. 475, 491–492 (1973).

Proper exhaustion reduces the quantity of prisoner suits because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court.[4] Finally, proper exhaustion improves the quality of those prisoner suits that are eventually filed because proper exhaustion often results in the creation of an administrative record that is helpful to the court. When a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved.

While requiring proper exhaustion serves the purposes of the PLRA, respondent's interpretation of §1997e(a)

---

[4]The dissent's objection, *post*, at 4, that exhaustion *simpliciter* is enough to reduce frivolous prisoner suits is not well taken. First, what matters is not whether proper exhaustion was necessary to reach that goal, but whether proper exhaustion was mandated by Congress. Second, the empirical support for the dissent's conclusion is weak. The dissent points to a drop in volume of prisoner litigation between 1995 and 2000 and concludes that it was "clearly a direct result of the PLRA's exhaustion requirement." *Post*, at 12. But this mistakes correlation for causation: A requirement of exhaustion *simpliciter* will not, absent a mollified prisoner, prevent a case from being docketed—and thus appearing in the filing statistics the dissent cites. The credit for reduced filings more likely belongs to the PLRA's enactment of 28 U. S. C. §1915A (requiring district courts to screen "before docketing, if feasible" prisoner civil complaints), and its amendments to §1915 (forbidding frequent-filer prisoners from proceeding *in forma pauperis*). Finally, prisoner civil rights and prison conditions cases still account for an outsized share of filings: From 2000 through 2005, such cases represented between 8.3% and 9.8% of the new filings in the federal district courts, or on average about one new prisoner case every other week for each of the nearly 1000 active and senior district judges across the country. See Administrative Office of the United States Courts, Judicial Facts and Figures, tbls. 1.1, 4.4, 4.6, http://www.uscourts.gov/judicialfactsfigures/contents.html (as visited June 19, 2006, and available in Clerk of Court's case file).

would make the PLRA exhaustion scheme wholly ineffective. The benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance. The prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules. A prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction, and under respondent's interpretation of the PLRA noncompliance carries no significant sanction. For example, a prisoner wishing to bypass available administrative remedies could simply file a late grievance without providing any reason for failing to file on time. If the prison then rejects the grievance as untimely, the prisoner could proceed directly to federal court. And acceptance of the late grievance would not thwart the prisoner's wish to bypass the administrative process; the prisoner could easily achieve this by violating other procedural rules until the prison administration has no alternative but to dismiss the grievance on procedural grounds. We are confident that the PLRA did not create such a toothless scheme.

Respondent argues that his interpretation of the PLRA's exhaustion provision would filter out frivolous claims because, by the time the deadline for filing a grievance has passed, the inmate may no longer wish to file suit. Brief for Respondent 43. But since the deadline for filing an administrative grievance is generally not very long—14 to 30 days according to the United States, see Brief for United States as *Amicus Curiae* 29, and even less according to respondent, see Brief for Respondent 30, n. 17—it is doubtful that Congress thought requiring a prisoner to wait this long would provide much of a deterrent. Indeed, many prisoners would probably find it difficult to prepare, file, and serve a civil complaint before the expiration of the

deadline for filing a grievance in many correctional systems.

Respondent also contends that his interpretation of the PLRA exhaustion requirement would filter out frivolous claims because prisoners could not simply wait until the deadline for filing an administrative grievance had passed. According to respondent, "most grievance systems give administrators the discretion to hear untimely grievances," and therefore a prisoner "will be required to file an untimely grievance and thereby give the grievance system" the opportunity to address the complaint. *Id.*, at 43. But assuming for the sake of argument that the premise of this argument is correct, *i.e.*, that a court could never conclude that administrative remedies were unavailable unless an administrative decision had so held, but see *Coleman*, 501 U. S., at 735, n., a prisoner who does not want to participate in the prison grievance process would have little difficulty in forcing the prison to dismiss his administrative case on procedural grounds. Under the California system, for example, a prisoner has numerous opportunities to miss deadlines. Therefore, the task of engineering such a dismissal of a grievance on procedural grounds is unlikely to be sufficient to alter the conduct of a prisoner whose objective is to bypass the administrative process.

C

Finally, as interpreted by respondent, the PLRA exhaustion requirement would be unprecedented. Respondent has not pointed to any statute or case that purports to require exhaustion while at the same time allowing a party to bypass deliberately the administrative process by flouting the agency's procedural rules. It is most unlikely that the PLRA, which was intended to deal with what was perceived as a disruptive tide of frivolous prisoner litigation, adopted an exhaustion requirement that goes further

than any other model that has been called to our attention in permitting the wholesale bypassing of administrative remedies. Respondent identifies three models for the scheme of "exhaustion *simpliciter*" that he believes is set out in the PLRA, but none of these examples is apt.

Respondent first looks to habeas law as it existed prior to *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Before then, a federal habeas claim could be procedurally defaulted only if the prisoner deliberately bypassed state remedies. See *Fay* v. *Noia*, 372 U. S. 391, 438 (1963). It would be fanciful, however, to suggest that the PLRA exhaustion requirement was patterned on habeas law as it existed in the years between *Fay* and *Wainwright*. As respondent stresses, the PLRA was enacted contemporaneously with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 104, which gave federal habeas review a structure markedly different from that which existed in the period between *Fay* and *Wainwright*.

Furthermore, respondent's interpretation of §1997e(a) would not duplicate the scheme that existed in habeas during that interval. As interpreted by respondent, §1997e(a) would permit a prisoner to bypass deliberately and flagrantly administrative review without any risk of sanction. Because it is unlikely that the PLRA was intended to permit this, the two Courts of Appeals that have held that §1997e(a) does not require proper exhaustion both pointedly stated that their decisions did not allow a prisoner to bypass deliberately administrative remedies. See 403 F. 3d, at 629; *Thomas*, 337 F. 3d, at 732, and n. 4. Neither of these courts, however, explained how §1997e(a) can be interpreted in this way—that is, so that it does not require proper exhaustion but somehow proscribes deliberate bypass.

Apparently recognizing that such an interpretation neither has a statutory basis nor refers to a concept of exhaustion from an existing body of law, respondent does

not contend that §1997e(a) prohibits deliberate bypass; in his view, all that §1997e(a) demands is that a prisoner wait until any opportunity for administrative review has evaporated. But in making this argument, respondent asks us to hold that the PLRA was meant to adopt an exhaustion scheme that stands in sharp contrast to both current and past habeas law and is unlike any other exhaustion scheme that has been called to our attention.

Respondent next suggests that the PLRA exhaustion requirement was patterned on §14(b) of the Age Discrimination in Employment Act of 1967, (ADEA), 81 Stat. 607, codified at 29 U. S. C. §633(b), and §706(e) of Title VII of the Civil Rights Act of 1964, 78 Stat. 260, as redesignated and amended, 42 U. S. C. §2000e–5(e), but these are implausible models. Neither of these provisions makes reference to the concept of exhaustion, and neither is in any sense an exhaustion provision.

In *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979), we considered §14(b) of the ADEA, which provides that, if a State has an agency to redress state-law age-related employment-discrimination claims, an ADEA claim may not be brought in federal court "before the expiration of sixty days *after proceedings have been commenced* under the State law." 29 U. S. C. §633(b) (emphasis added). This provision makes no reference to the exhaustion of state remedies, only to the "commence[ment]" of state proceedings, and this provision leaves no doubt that proper commencement of those proceedings is not required. As we noted, see *Oscar Mayer*, 441 U. S., at 759, §14(b) of the ADEA states that the requirement of commencement is satisfied merely by sending the state agency a signed statement of the pertinent facts, and §14(b) explicitly provides that the commencement requirement does not entail compliance with any other state procedural rule, including a deadline for initiating the state proceeding, *id.*, at 760. We see little similarity between §14(b), which

merely requires the commencement of state proceedings and *explicitly does not require* timely commencement, and 42 U. S. C. §1997e(a), which expressly requires exhaustion of available administrative remedies with no reference to a federally based limiting principle.

Section 706(e) of Title VII is also fundamentally different from the PLRA exhaustion provision. As interpreted by this Court, §706(e) means that a complainant who "initially institutes proceedings with a state or local agency with authority to grant or seek relief from the practice charged" must "file a charge" with that agency, or "have the EEOC refer the charge to that agency, within 240 days of the alleged discriminatory event . . . ." *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 110–111 (1988). Following the reasoning of *Oscar Mayer*, we held that this filing requirement did not demand that the charge submitted to the state or local authority be filed in compliance with the authority's time limit. 486 U. S., at 123–125. Because §706(e) of Title VII, refers only to the filing of a charge with a state or local agency and not to the exhaustion of remedies, §706(e) cannot be viewed as a model for the PLRA exhaustion provision.

IV

Respondent's remaining arguments regarding the interpretation of 42 U. S. C. §1997e(a) are unconvincing. Relying on the use of the term "until" in the phrase "until such administrative remedies as are available are exhausted," respondent contends that "[t]he use of the temporal word 'until' . . . conveys a timing requirement: it assumes that the question to be answered is simply whether the prisoner can file suit now or must wait until later." Brief for Respondent 11. Likewise, according to respondent, the use of the present tense ("such administrative remedies as *are* available," §1997e(a) (emphasis added)), requires "a focus on whether any administrative remedies are *pres-*

ently available." *Id.*, at 12. But saying that a party may not sue in federal court *until* the party first *pursues* all available avenues of administrative review necessarily means that, if the party never pursues all available avenues of administrative review, the person will never be able to sue in federal court. Thus, §1997e(a)'s use of the term "until" and the present tense does not support respondent's position.

Respondent attaches significance to the fact that the PLRA exhaustion provision does not expressly state that a prisoner must have "properly exhausted" available administrative remedies, whereas a tolling provision of the AEDPA provides that the time for filing a federal habeas petition is tolled during the period when "a *properly filed* application for State post-conviction or other collateral review . . . is pending." 28 U. S. C. §2244(d)(2) (emphasis added). In our view, respondent draws an unreasonable inference from the difference in the wording of these two provisions. Although the AEDPA and the PLRA were enacted at roughly the same time, they are separate and detailed pieces of legislation. Moreover, the AEDPA and PLRA provisions deal with separate issues: tolling in the case of AEDPA and exhaustion in the case of the PLRA.

Respondent maintains that his interpretation of the PLRA exhaustion provision is bolstered by another PLRA provision, 42 U. S. C. §1997e(c)(2), that permits a district court to dismiss certain prisoner claims "without first requiring the exhaustion of administrative remedies." According to respondent, this provision shows that Congress thought that, at the point when a district court might make such a ruling (which would typically be well after the filing of the complaint), a prisoner might still have the opportunity to exhaust administrative remedies. Because short administrative filing deadlines would make this impossible, respondent contends, Congress cannot have thought that a prisoner's failure to comply with those

deadlines would preclude litigation in federal court.

Respondent's argument is unconvincing for at least two reasons. First, respondent has not shown that Congress had reason to believe that every prison system would have relatively short and categorical filing deadlines. Indeed, respondent asserts that most grievance systems give administrators the discretion to hear untimely grievances. Second, even if dismissals under §1997e(c)(2) typically occur when the opportunity to pursue administrative remedies has passed, §1997e(c)(2) still serves a useful function by making it clear that the PLRA exhaustion requirement is not jurisdictional, and thus allowing a district court to dismiss plainly meritless claims without first addressing what may be a much more complex question, namely, whether the prisoner did in fact properly exhaust available administrative remedies.[5]

Respondent next argues that the similarity between the wording of the PLRA exhaustion provision and the AEDPA exhaustion provision, 28 U. S. C. §2254(c), shows that the PLRA provision was meant to incorporate the narrow technical definition of exhaustion that applies in habeas. We reject this argument for two reasons.

First, there is nothing particularly distinctive about the wording of the habeas and PLRA exhaustion provisions. They say what any exhaustion provision must say—that a judicial remedy may not be sought or obtained unless, until, or before certain other remedies are exhausted. It is, therefore, unrealistic to infer from the wording of the PLRA provision that Congress framed and adopted that

---

[5]Questions regarding the timeliness of prisoner filings occur frequently. See, *e.g.*, *Wallace* v. *Burbury*, 305 F. Supp. 2d 801, 806 (ND Ohio 2003); *Pusey* v. *Belanger*, No. Civ. 02–351–SLR, 2004 WL 2075472 (D. Del., Sept. 14, 2004); *Eakle* v. *Tennis*, No. Civ. 4:CV–04–2040, 2005 WL 2266270 (MD Pa., Sept. 16, 2005); *Williams* v. *Briley*, No. 04 C 5701, 2005 WL 1498865 (ND Ill., June 21, 2005); *Issac* v. *Nix*, No. Civ. A. 2:04CV172RWS, 2006 WL 861642 (ND Ga., Mar. 30, 2006).

provision with habeas law and not administrative law in mind. Indeed, the wording of the PLRA provision (a prisoner may not bring an action with respect to prison conditions "*until such administrative remedies as are available are exhausted*") is strikingly similar to our description of the doctrine of administrative exhaustion ("'no one is entitled to judicial relief for a supposed or threatened injury *until the prescribed administrative remedy has been exhausted*,'" *McKart*, 395 U. S., at 193 (citation omitted; emphasis added)).

Second, respondent's suggestion that the PLRA was meant to incorporate the same technical distinction that exists in habeas law without providing *any* sanction to prevent willful noncompliance—not even the deliberate bypass standard of *Fay*—would produce a scheme that in practical terms is radically different from the habeas scheme. Copying habeas' narrow definition of exhaustion without furnishing any sanction to promote compliance would be like copying the design for an airplane but omitting one of the wings.

Respondent contends that requiring proper exhaustion will lead prison administrators to devise procedural requirements that are designed to trap unwary prisoners and thus to defeat their claims. Respondent does not contend, however, that anything like this occurred in his case, and it is speculative that this will occur in the future. Corrections officials concerned about maintaining order in their institutions have a reason for creating and retaining grievance systems that provide—and that are perceived by prisoners as providing—a meaningful opportunity for prisoners to raise meritorious grievances. And with respect to the possibility that prisons might create procedural requirements for the purpose of tripping up all but the most skillful prisoners, while Congress repealed the "plain, speedy, and effective" standard, see 42 U. S. C. §1997e(a)(1) (1994 ed.) (repealed 1996), we have no occa-

sion here to decide how such situations might be addressed.

Respondent argues that requiring proper exhaustion is harsh for prisoners, who generally are untrained in the law and are often poorly educated. This argument overlooks the informality and relative simplicity of prison grievance systems like California's, as well as the fact that prisoners who litigate in federal court generally proceed *pro se* and are forced to comply with numerous unforgiving deadlines and other procedural requirements.

* * *

For these reasons, we reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case for proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 05–416

JEANNE S. WOODFORD, ET AL., PETITIONERS *v.*
VIET MIKE NGO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 2006]

JUSTICE BREYER, concurring in the judgment.

I agree with the Court that, in enacting the Prison Litigation Reform Act (PLRA), 42 U. S. C. §1997e(a), Congress intended the term "exhausted" to "mean what the term means in administrative law, where exhaustion means proper exhaustion." *Ante*, at 11. I do not believe that Congress desired a system in which prisoners could elect to bypass prison grievance systems without consequences. Administrative law, however, contains well established exceptions to exhaustion. See *Sims* v. *Apfel*, 530 U. S. 103, 115 (2000) (BREYER, J., joined by Rehnquist, C. J., and SCALIA and KENNEDY, JJ., dissenting) (constitutional claims); *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U. S. 1, 13 (2000) (futility); *McKart* v. *United States*, 395 U. S. 185, 197–201 (1969) (hardship); *McCarthy* v. *Madigan*, 503 U. S. 140, 147–148 (1992) (inadequate or unavailable administrative remedies); see generally II R. Pierce, Administrative Law Treatise §15 (4th ed. 2002). Moreover, habeas corpus law, which contains an exhaustion requirement that is "substantively similar" to administrative law's and which informs the Court's opinion, *ante*, at 9-10, also permits a number of exceptions. See *post*, at 5, n. 5 (STEVENS, J., dissenting) (noting that habeas corpus law permits "petitioners to overcome procedural defaults if they can show that the procedural rule is not firmly established

and regularly followed, if they can demonstrate cause and prejudice to overcome a procedural default, or if enforcing the procedural default rule would result in a miscarriage of justice" (citations omitted)).

At least two Circuits that have interpreted the statute in a manner similar to that which the Court today adopts have concluded that the PLRA's proper exhaustion requirement is not absolute. *See Spruill* v. *Gillis*, 372 F. 3d 218, 232 (CA3 2004); *Giano* v. *Goord*, 380 F. 3d 670, 677 (CA2 2004). In my view, on remand, the lower court should similarly consider any challenges that petitioner may have concerning whether his case falls into a traditional exception that the statute implicitly incorporates.

SUPREME COURT OF THE UNITED STATES

No. 05–416

JEANNE S. WOODFORD, ET AL., PETITIONERS *v.*
VIET MIKE NGO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 2006]

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

The citizen's right to access an impartial tribunal to seek redress for official grievances is so fundamental and so well established that it is sometimes taken for granted. A state statute that purported to impose a 15-day period of limitations on the right of a discrete class of litigants to sue a state official for violation of a federal right would obviously be unenforceable in a federal court. The question in this case is whether, by enacting the exhaustion requirement in the Prison Litigation Reform Act of 1995 (PLRA), Congress intended to authorize state correction officials to impose a comparable limitation on prisoners' constitutionally protected right of access to the federal courts. The text of the statute, particularly when read in the light of our well-settled jurisprudence, provides us with the same unambiguous negative answer that common sense would dictate.

I

Congress enacted the following exhaustion requirement in the PLRA:

> "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail,

> prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U. S. C. §1997e(a).

This provision requires prisoners to exhaust informal remedies before filing a lawsuit under federal law. They must file an administrative grievance and, if the resolution of that grievance is unsatisfactory to them, they must exhaust available administrative appeals. The statute, however, says nothing about the reasons why a grievance may have been denied; it does not distinguish between a denial on the merits and a denial based on a procedural error. It does not attach any significance to a prison official's decision that a prisoner has made procedural missteps in exhausting administrative remedies. In the words of federal courts jurisprudence, the text of the PLRA does not impose a waiver, or a procedural default, sanction, upon those prisoners who make such procedural errors. See *Engle* v. *Isaac*, 456 U. S. 107, 125–126, n. 28 (1982) (explaining that "the problem of waiver is separate from the question whether a state prisoner has exhausted state remedies").[1] The plain text of the PLRA simply requires that "such administrative remedies as are available" be exhausted before the prisoner can take the serious step of filing a federal lawsuit against the officials who hold him in custody.

Today, however, the Court concludes that the "PLRA exhaustion requirement requires proper exhaustion," *ante*, at 10. The absence of textual support for that conclusion is a sufficient reason for rejecting it. Unlike 28 U. S. C.

---

[1] Because we have used the term "waiver" in referring to this sanction in the habeas corpus context, I use that term in this opinion. Strictly speaking, it would be more accurate to characterize this sanction as a "forfeiture" sanction, as there is no question that prisoners do not, by making a procedural error in the course of exhausting administrative remedies, purposefully relinquish their right to bring constitutional claims in federal court.

§2244(d)(2), a tolling provision of the Antiterrorism and Effective Death Penalty Act of 1996, which was signed into law just two days before the PLRA, 42 U. S. C. §1997e(a) lacks any textual requirement of *proper* exhaustion. See *Artuz* v. *Bennett*, 531 U. S. 4, 8 (2000) (explaining the importance of the textual requirement that an application be "*properly* filed" under 28 U. S. C. §2244(d)(2)). Instead, just as in the habeas context, under the PLRA a prisoner "who has [procedurally] defaulted his federal claims in [a state prison grievance proceeding] meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman* v. *Thompson*, 501 U. S. 722, 732 (1991). Accordingly, under the plain text of 42 U. S. C. §1997e(a), respondent satisfied his duty to exhaust available administrative remedies before filing a federal lawsuit.

II

The majority essentially ignores the PLRA's text,[2] suggesting instead that general administrative law principles, which allow courts in certain circumstances to impose procedural default sanctions as a matter of federal common law, suggest we should read waiver into the PLRA. However, as discussed in Part III, *infra*, our cases make clear that such extratextual waiver sanctions are only appropriate if a statute directs a federal court to act

---

[2]The majority does not claim that the plain language of the statute dictates its decision, but rather that the text "strongly suggests" that the PLRA includes a procedural default sanction. *ante*, at 10. The majority then states: "Section 1997e(a) refers to 'such administrative remedies as are available,' and thus points to the doctrine of exhaustion in administrative law." *Ibid.* The reference to "administrative remedies" simply addresses the fact that the review procedures provided by prison officials are administrative in character rather than judicial. At any rate, as discussed in Part III, *infra*, the doctrine of exhaustion in administrative law does not support the majority's engraftment of a procedural default sanction into the PLRA.

as an appellate tribunal directly reviewing the decision of a federal agency. Because actions brought under Rev. Stat. §1979, 42 U. S. C. §1983, such as respondent's, are *de novo* proceedings in federal district court, the majority's invocation of these common-law principles is seriously misguided.

The majority's disregard of the plain text of the PLRA is especially unjustified in light of the backdrop against which the statute was enacted. We presume, of course, that Congress is familiar with this Court's precedents and expects its legislation to be interpreted in conformity with those precedents. See, *e.g.*, *Edelman* v. *Lynchburg College*, 535 U. S. 106, 117, n. 13 (2002); *Porter* v. *Nussle*, 534 U. S. 516, 528 (2002); *North Star Steel Co.* v. *Thomas*, 515 U. S. 29, 34 (1995). This strong presumption is even more forceful when the underlying precedent is " 'unusually important.' " *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274, 294, n. 1 (1998) (quoting *Cannon* v. *University of Chicago*, 441 U. S. 677, 699 (1979)). Consistent with this presumption, if we have already provided a definitive interpretation of the language in one statute, and Congress then uses nearly identical language in another statute, we will give the language in the latter statute an identical interpretation unless there is a clear indication in the text or legislative history that we should not do so. See, *e.g.*, *United States* v. *Wells*, 519 U. S. 482, 495 (1997). Under these elementary principles of statutory interpretation, the PLRA's exhaustion requirement does not incorporate a procedural default component.

As the Solicitor General correctly points out in his brief supporting petitioners, "the PLRA's exhaustion provision is essentially identical to that of the habeas corpus statute." Brief for United States as *Amicus Curiae* 13. Specifically, a provision in the federal habeas statute, first enacted in 1948 as a codification of a previous judge-made

rule,[3] bars relief "unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State," 28 U. S. C. §2254(b)(1)(A).[4] The PLRA similarly bars judicial relief "until such administrative remedies as are available are exhausted," 42 U. S. C. §1997e(a). The only noteworthy distinction between the two provisions is that 28 U. S. C. §2254(b)(1)(A) uses the word "unless," whereas 42 U. S. C. §1997e(a) uses the word "until." If anything, this distinction suggests that the exhaustion requirement in the PLRA is less amenable to a waiver sanction than the comparable requirement in the habeas statute: The word "until" indicates a temporal condition whereas the word "unless" would have been more appropriate for a procedural bar.

Notwithstanding the use of the word "unless" in 28 U. S. C. §2254(b)(1)(A), as the majority correctly recognizes, we have held that state-court remedies are "exhausted" for the purposes of the federal habeas statute so long as "they are no longer available, regardless of the reason for their unavailability," *ante*, at 9. In other words, the exhaustion requirement in the federal habeas statute does *not* incorporate a procedural default sanction.[5]

---

[3]See generally *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 850–853 (1999) (STEVENS, J., joined by GINSBURG and BREYER, JJ., dissenting) (tracing history of exhaustion requirement in habeas law).

[4]This language is, in relevant part, identical to the language as it was enacted in 1948. See 62 Stat. 967.

[5]In habeas law it is a separate judge-made doctrine of procedural default, stemming from our decision in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), that may bar relief even though a claim has been exhausted. This procedural default doctrine is based on unique considerations of comity in the habeas context, including the need to ensure that the state criminal trial remains the "main event" rather than a "tryout on the road" for a later federal habeas proceeding. *Id.*, at 90 (internal quotation marks omitted). Moreover, procedural default in habeas is closely related to the principle that this Court lacks certiorari jurisdiction to review a state-court judgment that rests on an adequate and independent state procedural ground. See *id.*, at 81–82. It is undisputed that these unique

Between Congress' codification of the exhaustion requirement in federal habeas law and Congress' adoption of an essentially identical exhaustion requirement in the PLRA, we decided no fewer than six cases in which we stated explicitly that a habeas petitioner satisfies the statutory exhaustion requirement so long as state-court remedies are no longer available to him at the time of the federal-court filing, regardless of the reason for their unavailability. See *Coleman*, 501 U. S., at 731; *Castille* v. *Peoples*, 489 U. S. 346, 351 (1989); *Teague* v. *Lane*, 489 U. S. 288, 298 (1989); *Engle*, 456 U. S., at 125, n. 8; *Humphrey* v. *Cady*, 405 U. S. 504, 516 (1972); *Fay* v. *Noia*, 372 U. S. 391, 434–435 (1963).

The Court rejects the obvious analogy to habeas law because the wording of the PLRA's exhaustion provision is also "strikingly similar to our description of the doctrine of administrative exhaustion, ("'no one is entitled to judicial relief for a supposed or threatened injury *until the pre-*

---

considerations do not apply in the context of 42 U. S. C. §1983 suits, because the "very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972). Accordingly, the majority correctly does not suggest that we incorporate our procedural default jurisprudence from the federal habeas context into prison conditions suits under §1983.

Nonetheless, I fear that the majority's analysis may actually create a harsher procedural default regime under the PLRA than the judge-made procedural default doctrine in habeas law. But see *Muhammad* v. *Close*, 540 U. S. 749, 751 (2004) *(per curiam)* (stating that "[p]risoners suing under §1983 . . . generally face a substantially lower gate [than prisoners seeking habeas corpus relief], even with the requirement of the Prison Litigation Reform Act of 1995 that administrative opportunities be exhausted first" (citing 42 U. S. C. §1997e(a))). Our habeas jurisprudence allows petitioners to overcome procedural defaults if they can show that the procedural rule is not firmly established and regularly followed, see *James* v. *Kentucky*, 466 U. S. 341, 348 (1984), if they can demonstrate cause and prejudice to overcome a procedural default, or if enforcing the procedural default rule would result in a miscarriage of justice, see *Murray* v. *Carrier*, 477 U. S. 478 (1986).

scribed administrative remedy has been exhausted,'" ante, at 20 (quoting *McKart* v. *United States*, 395 U. S. 185, 193 (1969), in turn citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51 (1938)). The language quoted by the majority from our case law is indeed similar to the language of the PLRA (and the habeas corpus statute). But this provides no help to the majority: We clearly used this language to describe only an exhaustion requirement, not a procedural default sanction.

The quoted language originally appeared in Justice Brandeis' opinion in *Myers*, 303 U. S., at 50–51. *Myers* is a simple exhaustion case: The question presented was whether an employer could seek the immediate intervention of federal courts in response to a complaint filed with the National Labor Relations Board that it had engaged in unfair labor practices, or whether it had to await the conclusion of the Board's proceedings to avail itself of judicial review. The case was purely about timing—there was no discussion whatever of procedural default.

McKart clearly recognized that the language of *Myers* concerned only exhaustion, not procedural default. Immediately after quoting *Myers*, the *McKart* Court discussed the benefits of exhaustion (primarily avoiding premature interruption of the agency process), and drew an analogy to judicial rules that limit interlocutory appeals, without making any reference to procedural default. See 395 U. S., at 193–194. It was not until later in the opinion that the *McKart* Court turned to a discussion of the considerations underlying the imposition of a procedural default sanction in cases "where the administrative process is at an end and a party seeks judicial review of a decision that was not appealed through the administrative process." *Id.*, at 194.

In sum, the language the majority quotes from *McKart* further supports the presumption that Congress intended the exhaustion requirement in the PLRA to be read in conformity with our decisions interpreting the exhaustion

requirement in the federal habeas statute—that is, to require exhaustion, but not to impose a waiver sanction for procedural errors made in the course of exhaustion.

III

Absent any support for a procedural default sanction in the text of the PLRA, the Court turns to background principles of administrative law in an effort to justify its holding. See *ante*, at 7–8. The Court's discussion of these background administrative law principles misapprehends our precedent.

As a general rule in the administrative law context, courts should not "'topple over administrative decisions unless the administrative body has not only erred, *but has erred against objection made at the appropriate time under its practice.*'" *Ante*, at 8 (quoting *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 37 (1952)). This doctrine is, "like most judicial doctrines, subject to numerous exceptions. Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." *McKart*, 395 U. S., at 193 (footnote omitted); see *id.*, at 198–201 (declining to apply waiver doctrine in the circumstances of the case before it).

The waiver doctrine in administrative law is "largely [a] creatur[e] of statute." *Sims* v. *Apfel*, 530 U. S. 103, 107 (2000). In other words, many statutes explicitly prohibit courts from considering claims "'that ha[ve] not been urged'" before the administrative agency. *Id.*, at 108 (quoting National Labor Relations Act, 29 U. S. C. §160(e) (1982 ed.)). See *L. A. Tucker Truck Lines*, 344 U. S., at 36, n. 6 (collecting statutes). It is important to emphasize that statutory waiver requirements always mandate, by their plain terms, that courts shall not consider arguments not properly raised before the agency; we have never

suggested that the word "exhaustion," standing alone, imposes a statutory waiver requirement. Accordingly, the Court's claim that a procedural default sanction is mandated by simply "interpreting and applying the statutory requirement set out in the PLRA exhaustion provision," *ante*, at 9, n. 2, is patently erroneous.

In the federal administrative law context we have also imposed waiver requirements even in the absence of explicit statutory directive. This judge-made rule, discussed extensively by the majority, see *ante*, at 6–8, however, is based on "an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Sims*, 530 U. S., at 108–109. As *amici curiae* law professors explain, this is because, in the context of such appellate review proceedings, procedural errors in the course of exhaustion naturally create bars to review because the decision under review rests on a procedural ground. Brief for Law Professors 1. Moreover, the rule that appellate tribunals will not consider claims not properly exhausted below prevents parties from being unfairly surprised on appeal by resolution of issues about which they lacked an opportunity or incentive to introduce evidence at trial. See *Sims*, 530 U. S., at 109. Accordingly, whether a court should impose a procedural default sanction for issues not properly exhausted in a prior administrative proceeding "depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Ibid.* (citing *L. A. Tucker Truck Lines* and *Hormel v. Helvering*, 312 U. S. 552 (1941)). If the analogy does not hold, we will not impose a procedural default sanction. See *Sims*, 530 U. S., at 108–110.[6]

---

[6]The majority's attempt to distinguish *Sims* as concerning "different questions," *ante*, at 8, n. 2, is perplexing, particularly in light of the fact that the United States, in its brief supporting petitioners, relies on *Sims* to argue that our administrative law decisions support the proposition that the Court should impose a waiver sanction into the PLRA.

Applying these principles, it is clear that ordinary principles of administrative law do not justify engrafting procedural default into the PLRA. The purpose of a 42 U. S. C. §1983 action such as that filed by respondent is not to obtain direct review of an order entered in the grievance procedure, but to obtain redress for an alleged violation of federal law committed by state corrections officials. See, *e.g.*, *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972). It is undisputed that the PLRA does nothing to change the nature of the federal action under §1983; prisoners who bring such actions after exhausting their administrative remedies are entitled to *de novo* proceedings in the federal district court without any deference (on issues of law or fact) to any ruling in the administrative grievance proceedings. In sum, because federal district court proceedings in prison condition litigation bear no resemblance to appellate review of lower court decisions, the administrative law precedent cited by the majority makes clear that we should not engraft a judge-made procedural default sanction into the PLRA.[7] The majority's misapprehension of our precedent is especially trou-

---

See Brief for United States as *Amicus Curiae* 11. Although the particular procedural error made during the exhaustion of administrative remedies was different in *Sims* than the procedural error at issue here, our analysis in *Sims* concerned the circumstances under which we should or should not engraft a waiver sanction into the administrative exhaustion process generally. See 530 U. S., at 108–112; *id.*, at 112–113 (O'Connor, J., concurring in part and concurring in judgment); *id.*, at 114–115 (BREYER, J., dissenting).

[7]The majority's suggestion that habeas law indicates otherwise, see *ante*, at 8 n. 2, is incorrect. As explained above, see n. 5, *supra*, the judge-made procedural default sanction in habeas law is based on unique considerations that do not apply to §1983 suits. Our precedent concerning judicial review of administrative proceedings, upon which the majority purports to rely, see *ante*, at 11, makes clear that we will not impose a waiver sanction when judicial review of the administrative decision does not resemble appellate review of lower court decisions.

bling because, as the American Bar Association points out, we should be particularly hesitant to impose "judicially-created procedural technicalities . . . 'in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.' " Brief as *Amicus Curiae* 11 (quoting *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 765, n. 13 (1979)).[8]

Finally, the majority's invocation of judge-made administrative law principles fails for an entirely separate reason: An "established exception" to the judge-made doctrine of procedural default in review of administrative proceedings permits individuals to raise constitutional complaints for the first time in federal court, even if they failed to raise those claims properly before the agency. *Sims*, 530 U. S., at 115 (BREYER, J., joined by Rehnquist, C. J., and SCALIA and KENNEDY, JJ., dissenting) (citing *Mathews* v. *Eldridge*, 424 U. S. 319, 329, n. 10 (1976)). Because respondent has raised constitutional claims, under our precedent, the Court may not, as a matter of federal common law, apply an extrastatutory waiver requirement against him.

IV

The principal arguments offered by the Court in support of its holding are policy arguments that, in its view, are grounded in the purposes of the PLRA.[9] The majority

---

[8]The majority notes that many prisoners proceed *pro se* in federal court, where there are also time limits and other procedural requirements. See *ante*, at 20. However, the timeliness and other procedural requirements of prison grievance systems are generally far more stringent than those imposed by federal courts. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 6, n. 1, 25–27; Brief for Jerome N. Frank Legal Services Organization of Yale Law School as *Amicus Curiae* A1–A7.

[9]Of course, if the majority were serious that "what matters is not whether proper exhaustion was necessary to reach [policy goals], but whether proper exhaustion was mandated by Congress," *ante*, at 12

correctly identifies two of the principal purposes of the PLRA: (1) affording corrections officials time and opportunity to address complaints internally before the initiation of a federal lawsuit; and (2) reducing the quantity, and improving the quality, of prison litigation. Both of these purposes would be served by the PLRA, even if the Court did not engraft a procedural default sanction into the statute.

The first policy concern identified by the majority does not even arguably justify either a timeliness requirement or a procedural default sanction. Prison officials certainly have the opportunity to address claims that were filed in some procedurally defective manner; indeed, California, like the vast majority of state prison systems, explicitly gives prison administrators an opportunity to hear untimely or otherwise procedurally defective grievances. Cal. Code Regs., tit. 15, §3084.3(c). See generally Roosevelt, Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error, 52 Emory L. J. 1771, 1810, and n. 192 (2003) (hereinafter Roosevelt). Because it is undisputed that the PLRA mandates that prisoners exhaust their administrative remedies before filing a federal lawsuit, prison officials will have the opportunity to address prisoners' claims before a suit is filed.[10]

Second, the PLRA has already had the effect of reducing the quantity of prison litigation, without the need for an extrastatutory procedural default sanction. As petitioners

---

n. 4, its opinion would not rest almost entirely on policy arguments.

[10] In this regard, the majority's reference to *Coleman* v. *Thompson*, 501 U. S. 722, 735, n. (1991), see *ante*, at 14, is perplexing. If a prison regulation explicitly grants prison officials discretion to consider untimely or otherwise procedurally defective grievances, of course prison grievance remedies would still be "available," and thus unexhausted, if a prisoner had not even tried to file a grievance simply because it was untimely or otherwise procedurally defective.

themselves point out, the number of civil rights suits filed by prisoners in federal court dropped from 41,679 in 1995 to 25,504 in 2000, and the rate of prisoner filing dropped even more dramatically during that period, from 37 prisoner suits per 1,000 inmates to 19 suits per 1,000 inmates. By contrast, between 2000 and 2004, the rate of filing remained relatively constant, dropping only "slight[ly]" to approximately 16 suits per 1000 inmates. See Brief for Petitioners 21–22. The sharp drop in prison litigation between 1995 and 2000 occurred *before* the Seventh Circuit's opinion in *Pozo* v. *McCaughtry*, 286 F. 3d 1022 (2002), which was the first appellate decision engrafting a procedural default sanction into the PLRA. Prior to *Pozo*, the federal courts had regularly assumed that the PLRA did not create any procedural default sanction, and dismissals for failure to exhaust were without prejudice. See Roosevelt 1780–1781 (discussing cases). Thus, the PLRA, including its simple exhaustion requirement, was sufficient to reduce the quantity of prisoner suits without any procedural default requirement. This is not surprising: Because the exhaustion requirement always ensures that prison officials have an opportunity to address claims brought by prisoners before a federal lawsuit, some prisoners will be "successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court," *ante*, at 12, in part because "the very fact of being heard . . . can mollify passions," *Booth* v. *Churner*, 532 U. S. 731, 737 (2001).[11]

Ordinary exhaustion also improves the quality of prisoner suits. By giving prison officials an opportunity to

---

[11] Without any support, the majority speculates that the drop in suits filed by prisoners between 1995 and 2000 resulted from other provisions of the PLRA. See *ante*, at 12, n. 4. Regardless, the aforementioned statistics demonstrate that the procedural default sanction imposed by the PLRA is unnecessary to reduce the quantity of prison litigation.

address a prisoner's grievance before the initiation of the lawsuit, ordinary exhaustion "often results in the creation of an administrative record that is helpful to the court," *ante*, at 12.[12]

I acknowledge, of course, that the majority's creation of a waiver sanction for procedural missteps during the course of exhaustion will have an even more significant effect in reducing the number of lawsuits filed by prisoners. However, "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) *(per curiam)* (emphasis deleted).

The competing values that Congress sought to effectuate by enacting the PLRA were reducing the number of frivolous filings, on one hand, while preserving prisoners' capacity to file meritorious claims, on the other. As explained by Senator Hatch when he introduced the legislation on the Senate floor, the PLRA was needed because the

---

[12]The majority also argues that ensuring strict compliance with strict prison timeliness requirements (generally ranging from 48 hours to a month, see n. 15, *infra*) will improve the quality of prisoner litigation because if "a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved." *Ante*, at 12. While these are advantages to filing grievances soon after the alleged injury occurs, courts regularly resolve §1983 (and other) litigation without such draconian time limitations. At any rate, as discussed below, legislation does not pursue any one purpose at all costs, and the marginal advantages of encouraging compliance with such short time limitations do not justify judicially rewriting the PLRA's exhaustion requirement by engrafting a procedural default sanction into the statute.

quantity of frivolous suits filed by prisoners was, in Senator Hatch's view, making it difficult for "courts to consider meritorious claims." 141 Cong. Rec. 27042 (Sept. 29, 1995). He continued: "Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised." *Ibid.* Similarly, as Senator Thurmond, a cosponsor of the bill, stated: "[The PLRA] will allow meritorious claims to be filed, but gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates." *Id.*, at 27044.

But the procedural default sanction created by this Court, unlike the exhaustion requirement created by Congress, bars litigation at random, irrespective of whether a claim is meritorious or frivolous.[13] Consider, for example, an inmate who has been raped while in prison. Such a scenario is far from hypothetical; in enacting the Prison Rape Elimination Act of 2003, 42 U. S. C. §15601, *et seq.* (2000 ed., Supp. III), Congress estimated that some one million people have been sexually assaulted in the Nation's prisons over the last 20 years, §15601(2). Although not all of these tragic incidents result in constitutional violations, the sovereign does have a constitutional duty to "provide humane conditions of confinement," *Farmer* v. *Brennan*, 511 U. S. 825, 832 (1994). Accordingly, those inmates who are sexually assaulted by guards, or whose sexual assaults by other inmates are facilitated by guards, have suffered grave deprivations of their Eighth Amendment rights. Yet, the Court's engraftment of a procedural default sanction into the PLRA's exhaustion requirement risks barring such claims when a pris-

---

[13] Indeed, if anything, it will have a worse effect on meritorious claims: prisoners who file frivolous claims are probably more likely to be repeat filers, and to learn the ins and outs of all procedural requirements.

oner fails, *inter alia*, to file her grievance (perhaps because she correctly fears retaliation[14]) within strict time requirements that are generally no more than 15 days, and that, in nine States, are between 2 and 5 days.[15]

Much of the majority opinion seems to assume that, absent the creation of a waiver sanction, prisoners will purposely circumvent prison grievance proceedings. However, prisoners generally lack both the incentive and the capacity to engage in such evasive tactics. Because federal courts do not provide any deference to administrative decisions by prison officials and any later federal suit is *de novo*, prisoners—even prisoners who are acting in bad faith—lack an incentive to avoid filing an administrative grievance unless they fear retaliation. Moreover, because prisoners must exhaust administrative remedies, prison officials can always thwart efforts by prisoners to avoid the grievance process by simply exercising their discretion to excuse any procedural defect in the presentation of the prisoners' claims.

At any rate, there is a simple solution that would allow courts to punish prisoners who seek to deliberately bypass state administrative remedies, but that would not impose the draconian punishment of procedural default on prisoners who make reasonable, good-faith efforts to comply with relevant administrative rules but, out of fear of retaliation, a reasonable mistake of law, or simple inadvertence, make some procedural misstep along the way. Federal

---

[14] See, *e.g.*, *Daskalea* v. *District of Columbia*, 227 F. 3d 433, 437, 439 (CADC 2000) (discussing how female prisoner had her underwear confiscated as "'contraband'" and was placed in solitary confinement without a mattress as a result of talking to prison officials about the sexual assaults and harassment to which guards had subjected her).

[15] For a comprehensive discussion of state prison grievance system filing deadlines, see Brief for American Civil Liberties Union et al. as *Amici Curiae* 6, n. 1, and Brief for Jerome N. Frank Legal Services Organization of Yale Law School as *Amicus Curiae* A1–A7.

courts could simply exercise their discretion to dismiss suits brought by the former group of litigants but not those brought by the latter.

The majority argues that imposing a sanction against prisoners who deliberately bypass administrative remedies "neither has a statutory basis nor refers to a concept of exhaustion from an existing body of law," *ante*, at 16. In fact, this criticism applies to the majority's engraftment of an overinclusive procedural default sanction into the PLRA. If this Court insists upon rewriting §1997e(a) in light of its understanding of the statute's purposes, surely the majority should add to the statute no harsher a sanction for making a procedural error during exhaustion than is necessary to accomplish its policy goals.

Moreover, ordinary abstention principles allow federal district courts to dismiss suits brought by prisoners who have deliberately bypassed available state remedies. Federal courts have the power to decline jurisdiction in exceptional circumstances, including the need to promote "wise judicial administration." *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 716 (1996) (internal quotation marks omitted). Indeed, in *Fay*, we emphasized the discretion of district court judges in embracing precisely such a deliberate bypass regime in the habeas corpus statute. See 372 U. S., at 438. Applying such a deliberate bypass sanction to the PLRA would ensure that prisoners who act in bad faith are penalized, while not interfering with the capacity of other inmates to litigate meritorious constitutional claims.

In sum, the version of the PLRA Congress actually enacted, which includes an exhaustion requirement but not a procedural default sanction, is plainly sufficient to advance the policy values identified by the Court. Moreover, if, as the Court worries, there are many prisoners who act in bad faith and purposely eschew administrative remedies, the imposition of a deliberate bypass standard

would resolve that problem, without depriving litigants who act in good faith but nonetheless make a procedural error from obtaining judicial relief relating to their valid constitutional claims. The majority's holding is as unsupported by the policy concerns it discusses as it is by the text of the statute.

V

The majority leaves open the question whether a prisoner's failure to comply properly with procedural requirements that do not provide a "meaningful opportunity for prisoners to raise meritorious grievances" would bar the later filing of a suit in federal court. *Ante*, at 19–20. What the majority has in mind by a "meaningful opportunity" is unclear, and this question is sure to breed a great deal of litigation in federal courts in the years to come.

For example, in this case, respondent filed a second grievance after his first grievance was rejected, arguing that his first grievance was in fact timely because he was challenging petitioners' continuing prohibition on his capacity to participate in Catholic observances, such as Confession, Holy Week services, and Bible study. The prison again rejected this second grievance on timeliness grounds, even though the denial of respondent's capacity to engage in religious activities was clearly ongoing, and thus had occurred within the prison's 15-day statute of limitations. See 403 F. 3d 620, 622 (CA9 2005). Assuming respondent explicitly requested the restoration of his right to engage in religious activities within 15 days of the filing of his second grievance and prison officials denied the request, did petitioners' grievance procedures fail to provide respondent with a "meaningful opportunity" to raise his claim, because, in light of the continuing nature of the injury respondent is challenging, his grievance was in fact timely? Cf. *Klehr* v. *A. O. Smith Corp.*, 521 U. S. 179, 189 (1997) (explaining that, under the Clayton Act, each overt

act in the case of a "continuing violation," such as a price-fixing conspiracy, is sufficient to restart the statute of limitations).

What about cases involving other types of procedural missteps? Does a 48-hour limitations period furnish a meaningful opportunity for a prisoner to raise meritorious grievances in the context of a juvenile who has been raped and repeatedly assaulted, with the knowledge and assistance of guards, while in detention? See *Minix* v. *Pazera*, No. 1:04 CV 447 RM, 2005 WL 1799538, *2 (ND Ind., July 27, 2005). Does a prison grievance system provide such a meaningful opportunity when women prisoners fail to file timely grievances relating to a pattern of rape and sexual harassment throughout a city's prisons, because they correctly fear retaliation if they file such complaints? See *Women Prisoners* v. *District of Columbia*, 877 F. Supp. 634 (DC 1994). Are such remedies meaningful when a prisoner files a grievance concerning a prison official having encouraged him to commit suicide, which the prisoner reasonably thinks raises one claim, but which prison officials interpret to raise two separate claims—one related to the guard's comments and one related to the prisoner's failure to receive health care—and thus dismiss for violating a prison regulation against including more than one claim in a single grievance? See *Harper* v. *Laufenberg*, No. 04–C–699–C, 2005 WL 79009, *3 (WD Wis., Jan. 6, 2005). What if prison officials dismiss a timely filed appeal because the prisoner explains that the prison will take two weeks to finish making certain copies of relevant documents by sending a letter to the Secretary of the Department of Corrections, rather than to the Secretary of Inmate Grievances and Appeals, as he should have under the prison regulations? See *Keys* v. *Craig*, 160 Fed. Appx. 125 (CA3 2005) *(per curiam)*. More generally, are remedies meaningful when prison officials refuse to hear a claim simply because a prisoner makes some hy-

pertechnical procedural error? See *Spruill* v. *Gillis*, 372 F. 3d 218, 232 (CA3 2004) (imposing a procedural default sanction in the PLRA, but stating that compliance with grievance proceedings need only be "substantial"); *Giano* v. *Goord*, 380 F. 3d 670, 676–678 (CA2 2004) (stating that failure to comply with procedural requirements in grievance proceedings may be excused based on special circumstances, such as a prisoner's reasonable, but mistaken, understanding of prison regulations).

Depending on the answer to questions like these, the majority's interpretation of the PLRA may cause the statute to be vulnerable to constitutional challenges. "[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 741 (1983). Accordingly, the Constitution guarantees that prisoners, like all citizens, have a reasonably adequate opportunity to raise constitutional claims before impartial judges, see, *e.g.*, *Lewis* v. *Casey*, 518 U. S. 343, 351 (1996). Moreover, because access to the courts is a fundamental right, see *id.*, at 346, government-drawn classifications that impose substantial burdens on the capacity of a group of citizens to exercise that right require searching judicial examination under the Equal Protection Clause, see, *e.g.*, *Lyng* v. *Automobile Workers*, 485 U. S. 360, 370 (1988).

The correct interpretation of the PLRA would obviate the need for litigation over any of these issues. More important, the correct interpretation of the statute would recognize that, in enacting the PLRA, Members of Congress created a rational regime designed to reduce the quantity of frivolous prison litigation while adhering to their constitutional duty "to respect the dignity of all persons," even "those convicted of heinous crimes." *Roper* v. *Simmons*, 543 U. S. 551, 560 (2005). Because today's decision ignores that duty, I respectfully dissent.